IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01/08/2003

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THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

CRIMINAL APPEAL NO.868 OF 2000 AND CRIMINAL APPEAL NO. 928 OF 2000

1. R. Paulsamy .. 1st Appellant in CA 868/00

2. Gladys Lilly .. 2nd Appellant in CA 868/00
and Respondent in CA 928/00

-Vs-

Superintendent,
Narcotics Control Bureau,
South Zonal Unit,
Chennai. .. Respondent in CA 868/00
and Appellant in CA 928/00

These criminal appeals are preferred under Section 374 of Cr.P.C.
against the judgment of the learned Special District and Sessions Judge for EC Act and NDPS Act Cases, Madurai in C.C.No.521 of 1998 dated 1 5.9.2000.

!For Appellants : Mr.B.Kumar, Senior Counsel
in CA 868/00 for Mr.S.Shanmugavelayutham
and Respondent
in CA 928/00

^For Respondent : Mr.P.N.Prakash
in C.A.868/00 Special Public Prosecutor,
and Appellant N.C.B.
in CA 928/00

:COMMON JUDGMENT

This judgment shall govern both the criminal appeals, and the parties hereinafter will be referred to as per the cause title in C.A.868 of 2000 namely appellants/A-1 and A-2 and respondent.
2. The appellants, who were arrayed as A-1 and A-2 respectively and who were charged and tried namely A-1 under Ss 8(c) read with 21 and 29 of N.D.P.S. Act and A-2 under Ss 27A, 28 and 29 of N.D.P.S. Act and Sec.193 of I.P.C., have challenged the judgment of the learned Special District and Sessions Judge for EC Act and NDPS Act cases convicting A-1 under Ss 8(c) read with 21 and 29 of N.D.P.S. Act and A-2 under Ss 28 and 29 of the N.D.P.S. Act and sentencing A-1 to undergo 15 years R.I. each and to pay a fine of

Rs.2.00 lakhs each in default to undergo S.I. for 2 years each and A-2 to undergo R.I. for 15 years each and to pay a fine of Rs.2.00 lakhs each in default to undergo 2 years S.I. each, while the State has challenged the acquittal of A-2 by the same Court in respect of the offences under Sec.27A of N.D.P.S. Act and Sec.193 of I.P.C.

3. The short facts necessary for the disposal of both the appeals can be stated thus:

(a) On 7.5.98 P.W.50, S.S.Krishnamurthi, the Assistant Director of N.C.B., South Zonal Unit, Chennai was on duty. At about 2.10 P.M. he received a telephonic call from his informer P.W.12 Dominic requesting him to come to Madurai on the same night so as to get a specific information regarding a narcotic offence. P.W.50 accompanied by P.W.1 Shanmugam, an Intelligence Officer and Sepoy Swaminathan left Madras at about 4.15 P.M. on the very same day in the official Car. On reaching Madurai at about 12.30 a.m., they could not meet the informer near Palanganatham Bus stand. Then, they proceeded to the place of the informer namely Radhapuram. On the way when they reached Valliyoor, they tried to contact P.W.12 informer over phone. P.W.12's father replied that his son P.W.12 was waiting in the Petrol bunk situated near Madurai Palanganatham Bus stand. P.Ws.1 and 50 returned back to Madurai. They were able to get in touch with P.W.12 at about 7.30 P. M. P.W.50 reduced the information given by P.W.12 into writing. The original was kept in a sealed cover. Ex.P73 was the information taken by P.W.50. At about 7.45 P.M. P.W.50 went to a STD Booth and contacted the Head Office through phone. P.W.52, Prabhu who was available in the Office at Chennai received the call. P.W.50 who received the information, placed the same before the Director of Narcotic Control Bureau. Ex.P.209 is the print out bill gi ven to P.W.50 in the STD Booth. At about 8.15 A.M. P.W.1 as per the directions of P.W.50 went to Thiruchenduran Mansion and returned back stating that the room No.1 16 was found locked. P.W.50 advised P.W.1 to fetch one independent witness for the purpose of seizure. P.W.50 was remaining in the same place and was on surveillance to find out the accused. At about 11.40 A.M. P.W.50 found the first accused coming in his official Jeep, getting down at Vasantha Nagar Bus Stop and proceeding to Thiruchenduran Mansion with a plastic bag being rolled and kept in his hand. At that time P.W.1 and P.W.7 Ayyannan, the village assistant came there. P.W.7 agreed to be a witness for the investigation. P.W.6 Krishna Rao, who was the Manager of the Thiruchenduran Mansion, was told about the identity of P.W.50 and also about the purpose of visit. P.W.6 also agreed to be a witness. Then P.W.50 accompanied by P.Ws.1, 6 and 7 went to the room No.116 in the first floor. The room was found locked inside. P.W.50 knocked the doors, and the same was opened by the first accused. P.W.50 introduced himself to the first accused and disclosed the purpose of visit and his intention to search room No.116 of the accused. He informed A-1 about his right available under Sec.50 of the NDPS Act. But, A-1 declined to avail the procedure of search before a Magistrate or a gazetted Officer and accepted P.W.50 to conduct the search by himself. P.W.50 asked A-1 whether there was any contraband heroin inside the room. At that time, A1 took out a rose colour polythene bag containing 2 packets inside a cloth bag, which was kept on the cot and handed over the same to P.W.50 and told him that it contained a narcotic drug heroin. P.Ws.1 and 50 deposed that at the time of handing over the heroin packets, the first accused told them that the same was recovered by a few minutes before in Vasantha Nagar Bus stop, and the same

was thrown in the street by a suspicious person, who ran away from the place, and he brought back the said heroin for the purpose of registering a case, but no mahazar was available with A-1 for the recovery of the said heroin. P.W.50 was also sure that when he was vigilantly watching at the bus stop, he found the first accused going to the Mansion only with a rolled rose colour plastic bag, and he did not notice such incidence as narrated by the first accused. Not satisfied with the explanation tendered by the first accused and finding that there are reasons to believe that the first accused was found to be in illegal possession of the heroin packets, he directed P.W.1 to seize them.

(b) In the presence of P.W.50, P.W.1 removed the brown colour adhesive tape covered in the first packet and found that there were two packets inside. Each packet was kept in polythene cover and contained each small packet inside the same. P.W.1 took two samples of 5 grams each from the first big packet by using the balance and put the same into two separate covers and sealed it with NCB No.11. He also measured the rest of the heroin in the packet and found the same was weighing 890 grams. He marked the two sample packets as PS1 and PS2 and the rest of the packet containing 890 grams as P1. Then P.W.1 removed the brown colour adhesive tape covered in the second packet and found that there were two packets inside. P.W.1 took two samples weighing about 5 grams each by using the balance and put the same into two separate covers and sealed it with NCB No.11. He also measured the rest of the heroin in the packet and found the same was weighing 948 grams. He marked the two sample packets as S3 and S4 and the rest of the packet containing 948 grams as P2. At the time of measurement and seizure P.Ws.6 and 7 were witnessing the investigation. A-1 also handed over his two identity cards under Exs.P4 and P5 and Ex.P2 Gramadhyog bill for purchasing the handbag marked as M.O.10 and also his train ticket for his proposed journey from Madurai to Nagercoil on 8.5 .1998. All those documents were recovered from the first accused at the time of seizure. The samples sealed cover are marked as M.Os.2, 3 , 5 and 6 respectively, while the sealed covers are marked as M.Os.1, 4 and 7 to 9 respectively. P.W.1 took the xerox copy of the identity cards Exs.P4 and P5 produced by the first accused and took the signature of the first accused in the xerox copy which was marked as Ex. P6. The first accused, P.W.1, P.W.50, P.W.6 and P.W.7 subscribed their signatures over M.Os.1 to 9. P.W.1 prepared mahazar in the presence of the first accused and the witnesses. M.Os.2, 5, 7 and 8 were sent for chemical analysis. The remaining M.Os.1, 3, 4, 6 and 9 were available in the same condition as they were at the time of seizure. M.O.10 was the cloth bag wherein the contraband was kept. M.O.11 was the rose colour polythene bag and M.O.12 was 2 numbers of adhesive tapes used by the first accused to cover the polythene packets. When P.W.1 prepared mahazar under Ex.P1, P.w.8 Vivekanandan, Jeep driver of the first accused came to Room No.116. P.W.50 asked P.W.8 to wait outside and after preparation of mahazar, he called P.W.8 inside. P.w.50 issued summons to P.W.8 and the first accused under Section 67 of NDPS Act, and they were marked as Exs.P185 and P182. Thereafter, the said room was locked and key was kept in the custody of P.W.1.

(c) The first accused was taken by P.W.50 to the Office of the Assistant Commissioner of Police, Madurai. P.W.50 examined P.W.8, and P. W.8 gave a statement in his own handwriting, which was recorded under Ex.P.58 and a copy was also received by him. P.W.50 examined the first accused, and the first accused also gave a statement in his own handwriting, and the same was marked as Ex.P.183. Then, P.w.50 prepared the arrest memo of the first

accused marked as Ex.P.184, and the same was also furnished to A1, who acknowledged the receipt in Ex.P.184, and a witness by name Karuppiah also attested the same. P.W.1 prepared a report under Ex.P7. P.W.50 also prepared a report under Section 57 of NDPS Act for the seizure and arrest of the first accused under Ex.P.210. P.W.50 also handed over the original information in writing given by P.W.12 under Ex.P.73 to P.W.1 to be handed over to the office at Madras. The first accused was produced before the concerned court and remanded to judicial custody till 24.5.1998. P.Ws.1 and 50 speak about all the facts in their evidence. P.W.50 then went to Tirunelveli and Tuticorin for the purpose of gathering evidence regarding the conspiracy of A-1 and A-2. On 16.5.98 he returned back to Madras. He came to know that the second accused has taken steps to abduct the informer P.W.12, and a case was registered in that regard. He contacted the District Special Crime Branch Inspector, Tirunelveli to furnish particulars and got a fax message that cases are registered in Valliyoor Police Station Crime No.141/98 and Kodambakkam Police Station Crime No.148/98 and Koodankulam Police Station Crime No.148/9 8 against A-2 and some others. Then, he contacted the Assistant Commissioner of Central Excise, Tanjore to find out whether A-2 was on duty or on leave. Ex.P111 is the letter sent by P.W.50 to the above address. Ex.P112 is the reply received from Tanjore. On 27.5.98 P.W.5 0 went to Madurai, Tirunelveli and Tuticorin to find out A-2. A-2 was relieved on 8.5.98 from her duty from Central Excise, Tanjore, and she was transferred to Tirunelveli, but she did not join duty at Tirunelveli, nor has she applied for any leave. P.W.50 enquired P.W.33 Prabakaran and obtained his statement. P.W.50 was transferred to Coimbatore as Deputy Superintendent of Police. P.W.51 Raghavan, Superintendent of NCB South Zone, Chennai, who was at camp at Hyderabad on 8.5 .98, came to the Office on 10.5.98 to receive the contraband seized. P.W.51 after receipt of the material objects issued Ex.P11 receipt. On 11.5.98 he entrusted the M.Os. to P.W.1. On 19.5.98 P.W.51 went to Central Excise Office at Madurai and handed over Ex.P17 letter to P.W.2 Periasamy successor in office of A-1, requesting copies of the documents. P.W.2 sent a reply under Ex.P18 along with the copies of the documents under Exs.P19 to P21. Ex.P19 information report was duly signed by P.W.4 Sriram. P.W.51 issued summons to P.W.3 Srinivasan. P.W.3 gave his statement, and it was marked as Ex.P40. On 20.5.98 P.W.51 and P.W.45 Rajasekaran went to P.W.7's house and issued summons to him. Since P.W.7 expressed his inability to write his statement, P.W.45 reduced the statement given by him into writing under Ex.P5 5. P.W.51 left for Madurai on 29.5.98 to find out the activities of the second accused. He learnt that two days back, A-2 was at Madurai, and at that time she was found to be with P.W.33 and one Karunakaran.

(d) P.W.51 issued summons to P.W.33 under Ex.P161A and examined him. P.W.33 gave a statement under Ex.P161 in his own handwriting. P.W.33 would confirm that he is the owner of Car bearing Registration No.TN-31-Y-3906. On 1.5.98 P.Ws.50 and 51 wen Tuticorin for examining Udayasooriyan, but, he was not available. P.W.51 came to know that some of the witnesses' statements under Sec.164 of Cr.P.C. were recorded in the Judicial Magistrate's Court, Musiri. He deputed Mr. Sivakumar to go to Musiri for getting the certified copies of the said statements. On 1.6.98 when P.W.51 came to the Office, he found a telegram under Ex.P88A issued in the name of P.W.15 Udayasuriyan. After serving summons under Ex.P189A, P.W.51 examined P.W.15. P.W.15 gave a statement under Ex.P90 in his own handwriting. P.W.15 also gave an additional

statement under Ex.P91 and confirmed the identity of A-2 available in Ex.P92 xerox copy of the photo. P.W.51 examined Thillairajan on 7.6.98 by issuing summons under Ex.P214. P.W.51 sent a letter under Ex.P176 to the Assistant Commissioner, Central Excise, Tirunelveli on 9.6.98 and enquired whether A-2 applied for leave. On 9.6.98 the NCB Office received a letter under Ex.P172 from P.W.12 stating that A-2 attempted to murder him. The office also received another telegram in the name of P.W.13 Sam Immanuel marked as Ex.P78A. After issuing summons under Ex.P80, P.W.51 examined P.W.13. At that time, P.W.13 handed over Exs.P82A and P83A documents. P.W.21 Ramkumar, Assistant Commissioner, Customs, Tirunelveli sent Ex.P110 reply stating that A-2 applied leave from 19.5.98 to 12.5.98 and extended the same to 30.6.98. P.W.51 asked about the particulars of the leave applied by her vide Ex.P61 letter. P.W.9 Subbiah Nadar gave a reply under Ex.P62 stating that after 30.6.98 there was no request from A-2 for extension of leave. P.W.51 deputed Nandakumar, an Intelligence Officer along with Ex.P27 letter to approach P.W.2 and collect the copies of the mahazars. P.W.2 gave a reply under Ex.P28 along with Exs.P29 to P38 and P45 documents. P.W.51 came to know that P.W.8 Vivekanandan, Sepoy-cum-Driver also appeared before the VI Metropolitan Magistrate' s Court, Chennai and gave a statement under Sec.164 of Cr.P.C. marked as Ex.P60. (e) P.W.51 thought it proper to examine one Mani. He went to his watch Company, but the same was found locked. He affixed the summons marked as Ex.P107 in the presence of P.W.20 Saminathan. He prepared a mahazar under Ex.P108. P.W.51 directed P.W.45 Rajasekaran, another Intelligence Officer to examine one Sekar. P.W.45 issued summons under Ex.P179 to the brother of Sekar namely P.W.39 Loganathan and recorded a statement. On directions Mr.Nandakumar, an Intelligence Officer went to Nagercoil and gave Ex.P205 letter to P.W.48 Sivasankaran, Sub-Divisional Officer, Telephone Exchange, Nagercoil. Ex.P206 is the reply sent by P.W.48. P.W.48 also furnished Exs.P206 to P208 printouts. On 24.7.98, P.W.51 went to the house of P.W.12 and gave summons under Ex.P75 and examined him. Ex.P76 is the statement given by P.W.12 in his own handwriting. P.W.51 started taking steps to arrest A-2. He gave Ex.P150 application t o all Women Police Station at Kottaru and got the assistance of P.W.32 Sathivanimuthu and one Vijayalakshmi, a Lady Constable. He deputed Sivakumar, another Intelligence Officer to examine Velmurugan. P.W.51 sent a letter under Ex.P113 to P.W.23 Gabrial Pandian, Superintendent of Central Excise, Tirunelveli. The summons to A-2 under Ex.P114 sent along with Ex.P113 was also served by affixture by the office of P.W.23. P.W.23 sent a reply under Ex.P116 to P.W.51. After getting permission, P.W.51 served summons under Ex.P46 on P.W.5 Sekar and recorded his statement under Ex.P47. On 31.7.98 P.W.51 received a letter under Ex.P119, and he came to know that A-2 extended her leave vide Exs.P120 and P121 letters. Since A-2 did not attend in person on 30.7.98, with the available evidence, P.W.51 filed a complaint on 3.8.98. On the same day A-2 gave two telegrams to P.W.51. He also received Ex.P219 letter. He gave a reply under Ex.P220, but it was returned unserved. The order of the High Court in O.P.12835/99 filed by A-2 under Sec.482 Cr.P. C. to quash the proceedings of this case is marked as Ex.P222. In Crl.O.P.No.17654/99, the High Court has directed the CBI Police and Tamil Nadu Police to arrest A-2 and produce before the Court. The order of the High Court is marked as Ex.P223. (f) On 1.2.2000 A-2 surrendered before the Nanguneri Judicial Magistrate's Court. P.W.51 obtained permission of this Court and went to

Kokarakulam Sub Jail for examining A-2 in the presence of P.W.31 and another lady Intelligence Officer Mrs.Javalia. P.W.31 examined A-2, and she gave a statement in writing under Ex.P149. P.W.14 Rajendran owner of the Ambassador Car No.TN 2938 was als o examined by the NCB Officials on 13.7.98 on summons under Ex.P86. The statement given by P.W.14 is marked as Ex.P87. P.W.16 Murugan who drove the vehicle from Madurai to Tiruchi and Musiri Court, was also examined, and his statement is marked as Ex.P95, while the summons issued to him is marked as Ex.P94. P.W.19 Kathirvel was also examined on summons under Ex. P102, and the statement given by him is marked as Ex.P103. P.W.25 Ramesh, Manager of Hotel Sudhara, T.Nagar, Chennai was summoned by the NCB Officials under Ex.P124, and he was examined. He gave a statement under Ex.P125. P.W.26 Packthavachalam, the then Manager of Nathan House Lodge, Chennai was also summoned under Ex.P128, and he gave a statement under Ex.P130. P.W.27 Ramababu, the Receptionist in Aruna International Hotel, Chennai was examined on summons under Ex.P131, and his statement is marked as Ex.P132. A summon was issued to P.W.29 Radhakrishnan, a Head Constable attached to D2 Jaihindpuram Police Station, Madurai under Ex.P145, and he gave a statement under Ex.P146. P.W.30 Mohan, an Intelligence Officer filed a report under Ex.P147. Ex.P148 is the second report filed by him. P.W.33 was examined, and he gave a statement under Ex.P174. P.W.37 S ivaraman, an Intelligence Officer gave summons under Ex.P131 to P.W.27 and recorded his statement under Ex.P132. He also gave summons to P.W.34 Suresh and recorded his statement under Ex.P164. He recovered Exs.P167 to P171 from P.W.34. He served summons under Ex.P124 to P.W.25 and recorded his statement under Ex.P125. He also recovered Exs.P122, P123, P126 and P12 7 from P.W.25. He also issued summons to P.W.26 and recorded his statement under Ex.P130. P.W.40 Selvi M.Pitchammal who was then Judicial Magistrate No.V, Madurai deposed that at the time of remand, A-1 did not complain about P.W.50. P.W.43 Gunaseelan, the then Metropolitan Magistrate No.VI, Chennai examined P.W.8 and recorded his statement under Sec.164 of Cr.P.C. marked as Ex.P160. P.W.44 Thayarammal, the then Chief Judicial Magistrate, Tiruchi passed an order under Ex.P18 6 directing the Judicial Magistrate No.V, Tiruchi to record the statement of P.W.33 under Sec.164 Cr.P.C. P.W.46 Tiruchitrambalam, then Judicial Magistrate No.II, Tuticorin recorded the statements of P.Ws.6 and 7 on 27.7.98 under Sec.164 Cr.P.C. marked as Exs.P53 and P57 respectively. P.W.47 Deenadayalan, the then Judicial Magistrate, Musiri recorded the statements of one Karuppiah, D.W.4 Mani and Chandrasekaran under Sec.164 of Cr.P.C. marked as Exs.P199, 201 and 203 respectively. P.W.49 Shaik Ahamed, the then Inspector of Police, Valliyoor P.S. deposed that the Crime No.141/98 was taken on file by the Judicial Magistrate, Valliyoor in C.C.No.134/98. After receipt of the contraband, P.W.11 Sankaran, Chemical Examiner attached to the Office of the Dekputy Chief Chemist, Customs House, Chennai conducted the test and gave two reports under Exs.P70 and P71. During test, he found that all the samples contained heroin.

4. In order to prove its case, the prosecution has examined 52 witnesses and marked 228 exhibits and 12 material objects. After the evidence of the prosecution was over, the accused were questioned under Sec.313 Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses. On the side of the defence, 4 witnesses were examined, and 7 documents were marked. Exs.C1 to C5 were marked. On hearing the submissions of both sides and consideration of the available materials, the trial Court

found A-1 guilty under Ss 8C r/w 21 and 29 of NDPS Act and A-2 guilty under Ss 28 and 29 of NDPS Act and sentenced them to undergo imprisonment as stated supra, while it has acquitted A-2 of all the other charges. While the appellants/A-1 and A-2 have brought forth an appeal against the conviction and sentence, the State has come forward with an appeal against the acquittal of A-2 under Sec.27A of the N.D.P.S. Act and Sec.193 of I.P.C.

5. Arguing for the appellants/A-1 and A-2 in C.A.868/00 and respondent in C.A.928/00, the learned Senior Counsel Mr.B.Kumar brought the following points for consideration by this Court:

(a) It is true that the appellant/first accused was in possession on 8.5.1998 of what he thought at that time as 2 kilograms of heroin, but the said fact could not ipso facto be an offence under the N.D.P. S. Act, as his status as an empowered officer having the powers of seizure under Sec.42 of the Act and the power to possess any narcotic drug under Sec.53 of the Act would be a complete answer to the charge of possession. Qua possession of a narcotic drug by an empowered officer to amount to an offence, the prosecution must further prove that the said official was in possession of the narcotic drug, which he had illegally acquired from a concerned source or having legally acquired was keeping it for utilisation for unlawful purposes. But, the prosecution has failed to prove the same in the instant case. Without proof in that regard, the prosecution would be wholly unsustainable. If it is not so, the act itself would not be properly worked and implemented. Both the appellants were empowered officers under the N.D.P.S. Act at all relevant times, and hence, they were entitled to protection under Sec.69 of the said Act stating that no prosecution or other legal proceedings shall be launched against them, while they are exercising their powers or discharging any functions or performing any duties under the Act for anything in good faith done or intended to be done under the Act.

(b) The burden of proof under Sec.54 of the Act and the presumption as to the mental state under Sec.35 of the Act would arise only when the prosecution has established the illegal source of acquisition of the narcotic drug by the empowered officer not otherwise, since any other view would amount to requiring the accused to prove his innocence. If the Court is of the view that there was a burden of proof on the accused under Ss 54 and 35 of the Act, having been in possession of a narcotic drug as an empowered officer, as such A-1 has discharged the burden under the said provisions. The burden of rebuttal casts on the accused to explain anything or rebut a rebuttable presumption is to be judged by the preponderance of probabilities as in a civil case and not by standard of proof beyond reasonable doubt. The accused can discharge the burden by showing the infirmities in the prosecution case, which itself would amount to a rebuttal and also by examining the defence witnesses and probablising his version of the event. In the instant case, the accused has done both. Number of witnesses on whose evidence the prosecution initially desired to rely, have turned hostile. It is true that the evidence of the hostile witness need not be described merely because he has turned hostile, but the evidence could be acted upon by either side, provided there is corroboration to his evidence. A person examined on behalf of the accused as a defence witness is also entitled to such credence as any such prosecution witness. In the instant case, the prosecution has rested its case on the previous statements recorded from the witnesses and has used such statements recorded during investigation as substantive evidence. The lower Court has

also relied on those statements and has treated them as substantive piece of evidence, despite the fact that the witnesses have turned hostile. This was on an erroneous interpretation of Sec.53A(1)(b) of the NDPS Act. In the instant case, the defence has thoroughly probablised even at the initial stage that the narcotic drug in question was recovered pursuant to an information by way of seizure at Pazhanganatham Bus Stop 150 feet away from his lodge, a few minutes earlier to the seizure in his room. In order to probablise the same, the defence has examined D.W.4 whose evidence is thoroughly corroborated by the evidence of P.Ws.2, 3, 5, 6, 7 and 8. Even the prosecution has specifically admitted that A-1 has stated the same at the time of seizure and the version of A-1 as mentioned in the mahazar. A-1 has stated in his statement recorded on the very next day on 9.5.1998 in Ex.P183 in which he has categorically named the two witnesses Sekar and D.W.4 Mani as the independent witnesses called by him and who were brought by him to the room to witness the mahazar proceedings. In fact number of questions have been put to A-1 during the course of enquiry under Sec.67 of the Act by P.W.50. All those questions were designed to discredit the defence version. Thus, at the earliest point of time A-1 has revealed how and what basis the 2 kgs. packets said to contain narcotic drug was found in his room under his occupation.

(c) During the course of trial, the accused examined D.W.4 who has deposed how he was present at the bus stop and witnessed the seizure of 2 packets later found to contain heroin. The evidence of D.W.4 was cogent and consistent with facts and surrounding circumstances. During the course of cross examination, P.W.8, Sepoy-cum-Driver has fully supported the defence version. Even though P.W.8 was treated as hostile, his evidence could be acted upon and relied on by the defence. P.W.6 the Manager of the Lodge has also deposed that A-1 when he came inside Senduran Mansion at about 12.00 noon, was accompanied by three persons one of them being P.W.8, and they went to his room. In this context A-1 has stated in Ex.P183 statement that he took the independent witnesses Sekar and D.W.4 Mani and P.W.8 to his room so as to commence writing mahazar for the seizure he has effected at the bus stop. P.W.7 does not discredit the defence version, but has deposed that he was called to the Deputy Commissioner's Office for the first time only on 9.5.1998 to sign as a mahazar wi tness under Ex.P1. Thus, the version of P.Ws.6 and 7 that they were made to sign Ex.P1 only at the Office of the Deputy Commissioner of Police at Madurai on 9.5.98 is also probablised as the place for writing the names of the witnesses at the top of Ex.P1 mahazar has been filled up later and that was also in a different ink. This defect in the mahazar was accepted even by P.W.50. Hence, P.Ws.6 and 7 could not be witnesses to the mahazar on 8.5.98.

(d) P.W.50 Officer has taken pains to discredit the version of seizing the goods at the bus stand at about 11.30 A.M. on 8.5.2000 in his oral evidence, which was thoroughly unacceptable. P.W.50 was the only witness who had kept surveillance between 8.30 A.M. and 11.40 A.M. of Room No.116, I Floor, Thiruchenduran Mansion. According to him, P.W.1 was sent away by P.W.50 at about 8.30 A.M. to fetch a Thalayari or other revenue official to be a witness for the mahazar proceedings and P.W.1 had gone and had not come back till A-1 had gone inside the room in the lodge. So, P.W.1 could not know what had happened in the bus stop. The Sepoy who was said to have come with P.Ws.1 and 50 from Madras was not examined. P.W.50 himself could not have witnessed what was taking place in the bus stop, since he got the information

that A-1 was keeping narcotic drugs specifically at room No.116 Thiruchenduran Mansion, which was situated in the first floor. It is pertinent to note that Thiruchenduran Mansion was in a lane away from the main road, wherein the bus stop was situated. According to P.Ws.1 and 50, they mounted surveillance of room No.116, Senduran Mansion which was in the first floor, and hence, it would be highly impossible to see also what was happening at the bus stop. Therefore, P.W.50 could not have seen about the seizure made by A-1 at the bus stop. Hence, P.W.50's evidence in that regard has got to be eliminated from consideration. It remains to be stated that in the case of statutory reports, Sec.57 reports of P.Ws.1 and 50 namely Exs.P7 and P210 do not mention about the surveillance at the bus stop. This fact was not even mentioned in the arrest memo or remand report or any other written contemporaneous document, and thus, the evidence of P.W.50 was inherently unacceptable.

(e) The defence has proved to the hilt that there was a seizure by A-1 of what he then thought as 2 kgs. of heroin. P.W.8 Vivekanandam, Sipoy cum Driver for the Central Excise Department has deposed that at 9.15 he went to the Excise Commissioner's Office and reported before A-1; that A-1 told him about an information so that the same could be investigated; that when P.W.8 asked A-1 if it was necessary to take another Officer, A-1 replied that there was only one Officer in the Office at that time and he would see whether the information was right or wrong; that on the way A-1 purchased a bag and came to Vasantha Nagar bus stop; that he stopped the jeep at the right side; that A-1 got down from the jeep; that he saw a person with bag trying to run away on seeing A-1; that A-1 chased him, but the person dropped the bag and ran away; that A-1 recovered the bag, brought two persons as witnesses and came to the jeep; that A-1 kept the bag in the jeep and went to the STD Booth to make a phone call to his Office, but he could not get connection; that he wanted to keep the goods in a safe place; that then all the three of them went to Thiruchenduran Mansion situated about 150 feet away from the place of seizure; that he kept the bag in the cot in the room and told P.W.8 to wait there as he wanted to make a phone call to his office; that at that time, the NCB Officers came there, enquired them and told them to go and sit in the reception in the ground floor; that he was waiting there, and the key for the jeep was taken from him; and that he also identified M.O.10 as the bag purchased by A-1 and M.O.11 as the bag containing 2 kgs. of heroin dropped by the person at the bus stop. Though P.W.8 has turned hostile, his evidence was acceptable, since he was an employee of the Central Excise Department. He was a natural witness, who had admittedly drove the official jeep in which A-1 travelled. His categorical statement that A-1 alone travelled in the jeep to work out the information received, which might lead to the recovery was also corroborated by the evidence of the prosecution witnesses themselves.

(f) P.W.2 Periyasamy, Superintendent of Customs and Central Excise has deposed that he was not available in the Office as he thought after 12.30 P.M. alone is auspicious time to take charge from A-1, who was then transferred to another post. P.W.3 Suresh, Inspector has deposed that he was the only person in the Office, as there was no other Officer available to man the Office. It is not disputed that there was a requirement that at least one Officer must be present in the Office at all times. So, there was full corroboration. The log book of the Office also shows the same, and P.Ws.2 and 3 have also confirmed the same. The prosecution has relied on only the two independent

witnesses for the alleged seizure namely P.Ws.6 and 7, but both have turned hostile. It is pertinent to point out that P.W.6 the Manager of the Thiruchenduran Mansion has stated that about 12.00 noon on that day, A-1 with two or three persons went to his room; that thereafter, NCB Officers came to the room; and that they told all the three persons to go out of the room. He has also added that the next day at the Deputy Police Commissioner's Office, he signed the mahazar. P.W.7 has also deposed that he was only called on 9.5.98 to the Office of the Deputy Commissioner of Police, where he signed the mahazar as a witness. D.W.4 Sekar has categorically deposed that he was standing at Vasantha Nagar bus stop at about 11.30 A.M.; that A-1 chased a person carrying a plastic bag; and that the said person dropped the plastic bag. He has narrated all the sequence of events. The said Sekar accompanied by another witness has gone to the said lodge. His evidence was consistent and acceptable. Even immediately after the seizure, A-1 has stated that he had indeed got narcotic drugs only by way of seizure. Having regard to the fact that A-1 was Superintendent of Central Excise who had effected number of seizures, his explanation was perfectly acceptable and no accused would have done anything more to prove his defence.

(g) As regards the question why did not A-1 prepare the mahazar on the spot namely the bus stop, since it was a bus stop, which was crowded that time, it would not be conducive to write a mahazar. That apart, Thiruchenduran Mansion where A-1 was staying, was only 150 feet away. P.W.5 Sekar has stated that as there are no facilities to write the mahazar at the place where the seizure was made, they used to write the mahazar at a convenient building or place nearby. The fact that on the day the bus stop was heavily crowded due to Chithirai festival is spoken to by P.Ws.8 and 22 and D.W.4 Mani. It is pertinent to note that A-1 has come to the lodge along with two mahazar witnesses and P.W.8 also. After seizing the packets and understanding that it contained heroin, A-1 has called two mahazar witnesses namely D.W.4 and one Sekar. D.W.4 has a watch repair shop in the bus stand itself and has witnessed A-1 chasing the person and the person dropping the bag and fleeing. It is true that A-1 has not recorded the information received by him before starting from the Office of the Customs. It was because of the reason that it was very vague and did not name any informant or the accused. Since the seizure has taken place in a public place, it was not necessary to be taken down in writing. For seizure in a public place like bus stand only Sec.43 of the Act would apply. P.W.5 Investigating Officer, Customs Department admits that it is not the practice of the department to record the information if the seizure takes place at a public place like bus stand. (h) Exs.P19 and P33 were relied upon by the prosecution to show that those informations have been reduced into writing even though the information has not named any specific accused. This material does not further the case of the prosecution for more reasons than one. Both Exs.P19 and P33 information was more detailed and specific. Under Ex.P19 even the time within which the transportation will take place as also the destination of the drugs was mentioned. Therefore, it was a precise information. In Ex.P33, the information recorded specifically mentions where the Ganja had been kept concealed, the quantity of goods, the value and wherefrom it has been brought. Both Exs.P19 and P33 show that the information was given by the informer. If the seizure is effected pursuant to the information from the informer, who was willing to disclose his identity, then the information has got to be recorded

to disburse the award to him if necessary. But in this case, as seen in the statement of A-1 under Ex.P183, the person who phoned to him was unwilling to disclose his identity and kept the phone down. It is pertinent to note that while questioning under Sec.313 of Cr.P.C., A-1 has answered that it is the practice of the department to reduce it into writing only the authenticated information, and the information for which the informers were unwilling to disclose their identity, would not have been normally recorded. Therefore, the contention of the State was not acceptable.

(i) It remains to be stated that P.W.50 who had come all the way from Madras to Madurai, has not chosen to record the information, and there is also no evidence that P.W.50 or P.W.1 was carrying arms for this particular assignment. P.W.1 has well admitted that they have not brought any kit for testing the goods, if they are narcotic drugs. Thus, the conduct of P.Ws.1 and 50 itself is an indication that there is no uniform procedure followed by all the Investigating Officers under the Act. When A-1 was examined under Sec.313 of Cr.P.C., the attention of the accused was not drawn for the circumstances to draw adverse inference against him on account of Exs.P19 and P33, and hence, it is not a circumstance against the appellant/A-1. P.W.8 Vivekanandam has fully supported the defence version. P.W.3 has admitted that he was the only Officer left in the Office. P.W.3 has come to the Office only after 12.30 P.M. on 8.5.98 as he thought it was auspicious only after 12.30 to take charge. Thus, there is not even one circumstance which is not capable of explanation on a reasonable hypothesis.

(j) The defence has established its version fully by examining D.W.4 whose evidence was amply corroborated by the evidence of P.Ws.2, 5, 6, 7 and 8. D.W.4 is an independent witness. He was the owner of a watch repair shop in the bus stop. Hence, his presence in the spot, where A-1 seized the goods was natural. It can not be disputed that D.W.4 was not known to A-1 previously. No suggestion has been made to D.W.4 in this regard, nor is there any material produced by the prosecution to show that A-1 knew him earlier. Hence, when A-1 stated that he called him at that spot, it must be correct. Nothing in the cross-examination of D.W.4 has shaken the witness or brought on record any feature to discredit his version. The name of D.W.4 has been mentioned by A-1 at the time of seizure in his room itself. Hence, the contention of the State that A-1 had not mentioned the name of either D.Sekar or Mani D.W.4 as witnesses to the seizure at Pazhanganaatham bus stop at the earliest point of time, and Ex.P1 mahazar does not contain any averment that A-1 had so mentioned the names of these two witnesses cannot be accepted.

(k) The circumstances point that A-1 must have informed the names of both the witnesses, but it was not incorporated in Ex.P1. Even from Ex.P183 statement it is very clear that A-1 has indeed mentioned the names of the witnesses Sekar and Mani at the earliest point of time even before recording Ex.P1. A careful reading of Ex.P183 statement would reveal the same. The same would conclusively negative the theory of the prosecution that A-1 had not mentioned the names of the witnesses at the earliest point of time. Under Ex.P183, he had mentioned the names of both persons. From the time of apprehension at the Mansion till he was remanded to custody on the night of 9.5.98, A-1 was in the custody of P.W.50, and no outsider has met him nor did he consult any other person. Since no material is available to show that A-1 had known D.W.4 earlier at all, A-1 could have mentioned D.W.4's name only because he was present at the time of the seizure as a witness. Under such

circumstances, the non-mentioning of the names of the witnesses in Ex.P1 itself loses significance. The prosecution has deliberately not examined Sekar and D.W.4. The explanation tendered by P.W.1 was not acceptable. P.Ws.1 and 50 had already rejected the case of A-1 without any examination and consideration and were bent on prosecuting him from the beginning. Therefore, the non-examination of D.W.4 and Sekar immediately after the seizure, was an important circumstance against the prosecution. The prosecution has relied upon Ex.P215, a letter alleged to have been written by D.W.4. The occurrence was on 8.5.98, but the first effort was made to contact D.W.4 only on 21.7.98. This would strengthen their theory and not to find out whether A-1's version could be true. It is pertinent to note that D.W.4 has asserted and reiterated what he had witnessed at the bus stand on 8.5.98. It was the case of the prosecution that the said Sekar was a stock witness, and the same was revealed from Exs.P21 and P45. If the signature in Ex.P21 and P45 was compared with the signature in the letter written by Sekar to NCB Department under Ex.P178, it would be clear that all of them are by the same person. Therefore, the person who wrote Ex.P178 must be Sekar as mentioned in Exs.P21 and P4 5. Sec.73 of the Evidence Act was also invoked by the prosecution in that regard. But, the same was misconceived. It was not suggested to any witness that the name of Sekar in Exs.P21 and P45 is the said Sekar mentioned by A-1 as working in Cinema Theatre. Without this basic premise, no argument could be built. Sec.73 of the Evidence Act could be used only to ascertain whether the signature is that of the person whom it purports to have been written, and it could be done by comparison with the admitted signature. But, Sec.73 of the Evidence Act cannot be used to require the Court to compare the signature especially to fix the identity of the person who wrote it. The circumstance that the signatures in Exs.P21 and P45 are the same as that of the signature in Ex.P178 letter to NCB was not a circumstance that could be put to the accused under Sec.313 Cr.P.C. The inference that because the signatures in Exs.P21, P45 and P178 were that of Sekar, they were all by the same person and the said Sekar was therefore known to A-1 even earlier are all not the circumstances, which were put to the accused under Sec.313 of Cr.P.C., and hence, those circumstances should be eschewed from consideration.

(l) There are serious infirmities in the prosecution case, which cast considerable doubt on the validity of the theory propounded by them. According to the prosecution, the information is said to be Ex.P73 , and it was mentioned as though at about 7.00 A.M. P.W.12 gave the information to P.W.50, while they were sitting in a Car at the bus stand. The author of the information has been examined as P.W.12, which is extraordinary. That apart, P.W.12 had not supported the prosecution case and has turned hostile, and hence, what is contained in Ex. P73 becomes a false document, and it cannot be considered as an information. If so, the real information is not before the Court and whole of the evidence of P.W.12 would indicate violation of Sec.42 of the Act, thereby violating the entire investigation and trial. Neither Ex.P1 mahazar nor Sec.57 report given by P.W.1 under Ex.P7 and Sec.57 report under Ex.P210 by P.W.50 mentioned about the information much less about its contents. Neither the remand report nor the arrest memo mentions anything about the information. When A-1 was questioned on 9.5.98, no question was asked about A-2. It is unusual since according to P.W.50, Ex.P73 contained also about the involvement of A-2 in the occurrence. The case of the prosecution that A-2 has been mentioned in the information was palpably false

in view of the evidence of P.W.22 who clearly says that from 2nd onwards A-2 was continuously in Thanjavur and in fact accepted a farewell party given in her honour by the Officers on the afternoon of 8.5.98. Thus, the wanton implication of A-2 at a later point of time is an explanation why the information report was not sent to the Court along with the original documents at the time of remand and why no contemporaneous document mentioning about the information in the case at all. The non-examination of the witnesses Sekar and Mani named to categorically by A-1 even at the time of seizure and while giving a statement under Sec.67 of the Act in Ex.P183 is fatal to the prosecution. Only to discredit the version of A-1 that he recovered 2 kgs. of powder which he believed to be heroin at the bus stand a few minutes back, P.W.50 made a bald statement. The Officials deliberately have not chosen to draw the site plan, nor have they chosen to examine the only other person available along with A-1 namely Sipoy Swaminathan. Thus, what was available for the prosecution was the solitary evidence of P.W.50, which was not acceptable. The prosecution has deliberately impersonated with full knowledge and let in evidence through such person to implicate A-2 and also to show that the occurrence was true.

(m) P.W.51 Raghavan, Superintendent recorded a statement from a person calling himself Thillairajan son of Thanuvan, aged 25 years, a resident of Ilayanayinarkulam, Vadakkur, Radhapuram Taluk, Tirunelveli, which is marked as Ex.P228, and the same was dated 7.6.98. According to the statement, he knew Sam Emanuel P.W.13 and also A-2, and there was a publication in the newspaper and magazine Nettrikan on 29.5.98 in which Sam Emanuel's name has also been mentioned. On enquiry from Sam Emanuel who was afraid of the article in the magazine, P.W.13 answered him that on 7.5.98 he met A-2 at Nagarcoil, and he was asked to go to Madurai to carry the belongings and luggage of A-1 who is going out of Madurai on transfer and while doing so also carried 2 kgs. of heroin that was kept with A-1 and he offered him Rs.300/- for expenses; that he refused his offer; and that on hearing that A-1 was caught with 2 kgs. of heroin, he wanted to go and tell NCB what he knew about the occurrence. In the statement it is further mentioned that he met also Velmurugan D.W.2 accidentally and he said that he is going to Madurai. On 8.5.98, he again happened to meet Velmurugan at 8.3 0 A.M. at Valliyur. He is said to have told Thillairajan that on the previous day he met A-1 at the lodge and A-1 gave him 5 kgs. of heroin to be taken to Tirunelvelli and in the course of the journey, he became afraid and phoned to Thisayanvillai and somebody came and took the 5 kgs. from him. The said Velmurugan was missing from his address, and it is his information that A-2's men have taken. The statement under Sec.67 of the Act recorded by P.W.51 was marked in the case to implicate A-2 and to probablise that A-2 was keeping the contraband goods in his room in the lodge. During the course of evidence, the accused has examined D.W.1 Thillairajan. His evidence categorically shows that somebody has impersonated him; and that a statement was recorded by P.W.51. D.W.2 has categorically spoken to the fact that he was taken to the NCB Office by P.W.12 Dominic to write the statement as if he is Thillairajan. Velmurugan in his statement says that P. Ws.50 and 51 and a few other Officers persuaded him to sign as Thillairajan, receive summons as Thillairajan and to write as dictated by P.W.51 and also sign as Thillairajan. His defence statement fully establishes that Ex.P228 was a false document given by D.W.2 Velmurugan impersonating for Thillairajan at the instance of P.Ws.50 and 51. The falsity of the evidence

adduced would clearly speak of the deliberate act of impersonation and the conduct of the Officials in foisting a case against the accused. The prosecution has deliberately introduced as though firstly Sam Emanuel and later Vel Murugan were called by A-2 to help A-1 to transport his things and luggage on the night of 8 .5.98 as he was transferred out of Madurai. It has to be pointed out that A-1 was not transferred out of Madurai at all, but he was merely transferred from a Preventive Officer to look after the legal work in the Courts in the same department at the same place Madurai. In the instant case, there was a strong motive to implicate the appellants due to his enmity with the then Commissioner of Customs J.M.K. Sekar. There was such a simmering dispute as accepted by P.W.50.

(n) The prosecution has much relied on the statement recorded under Sec.53A(1)(B) of the Act. The persons who have given evidence however have resiled from those statements in the witness box, and they were treated as hostile and cross-examined by the prosecution. The trial Court has held that the statement was admissible in evidence, since it was a substantive piece of evidence, and it could be preferred over the oral evidence given by them during trial. Thus, the previous statement of a living person has been used in the case for the purpose of contradicting as provided under Sec.145 of the Evidence Act. In arriving at such a conclusion, the trial Court has given two reasons that the Officers were entitled to record the statements from witnesses under Sec.67 of the Act, and the Officers being not police officers, there was no bar in admitting the statement. The trial Court has also held that it could be used as a substantive evidence solely on the basis of the statement of objects and records for introducing the amendment in 1989 wherein Sec.53A was introduced. Both the reasoning of the trial Court appears to be erroneous for number of reasons. The statement of objects cannot be taken into consideration for the purposes of interpreting a particular provision of Section which was laid down in the authoritative pronouncement of the Supreme Court in 1 952 SC 369. The said decision of the Apex Court was followed by this Court in a recent judgment reported in 2002(4) CTC 141. It is pertinent to note that Sec.53 of the Act has not mentioned any nonabsenti clause, and hence, it does not say that this provision would prevail over the evidence Act or any other law contrary to it. It is well settled that the Evidence Act is a complete Code. What is not evidence as per the provisions of the Evidence Act could not be utilised in any prosecution in a Court of law to arrive at a conclusion. Hence, it would be clear that the previous statement of any person could be used only for the purpose mentioned unde r Sec.145 of the Evidence Act and nothing more. Even assuming that the previous statements of a witness is admissible, the Section says that the previous statement could be admitted only if a witness is dead or cannot be found out or if alive and called as a witness, and the Court in the circumstances of the case think it just to admit. As regards the question what could be the circumstances the Court would admit the evidence, the circumstances must be such to make the previous statement admissible. The term "circumstances" used in the Section has nothing to do with the validity of the statement or how it was given. Therefore, the enquiry whether it was voluntary or not is not germane to the Section. On a proper construction, it is necessary for the Court to briefly record what are the circumstances made out by the prosecution to make the previous statement admissible. Unless the Courts come to the conclusion, the statement in the witness box in Court cannot be admitted at all. Such thing

has not been done in this case, and hence, the previous statements of the witnesses are not admissible at all. If allowed, this would do great violation to the entire Evidence Act. A right of the accused to test the veracity of deposition by cross examination is fundamental or a fair proceeding where if such a right is denied in a case, the same may result in deprivation of personal liberty by way of punishment by way of imprisonment. Hence, such a procedure will be wholly unconstitutional and violative of Article 21 of the Constitution. Therefore, the trial Court has wrongly held that it is substantive evidence and it need not necessarily be used for the purpose of contradiction or corroboration.

(o) It has to be pointed out that Sec.53A is not confined to Customs, NCB and such other officers who are not police officers. If Sec.53 A is literally construed, then even the statement recorded by the police would become admissible, which would be violative of Sec.161 of Cr.P.C. The analysis of the sample and the Chemical Examiner's report also throw considerable doubt on the prosecution case, and the goods recovered is not a narcotic substance namely heroin at all. P.W.11 Chemical Examiner has stated that except in one 10 gram packet all others merely contained traces of Di-acetyle morphine. P.W.11 has clearly admitted that they have instrument even to calculate 1/1000% of Di-acetyle morphine. This would clearly indicate the motive of the NCB to blame the appellants. Hence, the substance, the subject matter of the case cannot be called as heroin at all. Heroin as a drug must do what the drug intended to do namely to produce intoxication. The process can never result in intoxication. In this view also, the prosecution has totally failed. In view of the above reasons, the appellants are therefore entitled to an acquittal by this Court, and the appeal filed by the A-1 and A-2 has got to be allowed.

6. The learned Senior Counsel has further made the following submissions:

(a) Even though in Ex.P73 information the name of A-2 has been mentioned as if she was trafficking in heroin along with A-1 by sending the same to the smugglers near Thoothukudi, there is no reference about the A-2's part in the present 2 kgs. of heroin and her alleged involvement in connection with the offence in question. Hence, Ex.P73 should have come into existence belatedly, after much deliberations and after other documents like Ex.P1 mahazar, Ex.P8 remand report of A-1, Ex.P72 letter from Dominic to Revenue Secretary, Ex.P183 the statement of A-1 and Ex.P184 arrest memo. In Ex.P74 First Information Report relating to Valliyur Crime No.141/98 given by Dominic also there is no mention about the present allegations asking P.W.12 to arrest him to bring two kgs. of heroin from Madurai to Nagercoil for which he will be paid a sum of Rs.300/-. There was no reference about the telephonic conversation allegedly made by A-2 to P.W.12, nor had he mentioned about the information given by P.W.12 in Ex.P73 and P.W.50 Krishnamoorthy about the involvement of A-1 and A-2. A very reading of Ex.P74 discloses that it is only a protection seeking petition from the accused party, and it has no reference to the present prosecution case. Even in Ex.P77 a direction petition filed by P.W.12 Dominic against the second accused, there was no reference to the telephonic conversation and that she was willing willing to finance a sum of Rs.300 /- as spoken to by the present prosecution case. Hence, the alleged involvement of A-2 as projected by the prosecution is not referred to in Ex.P77 also.

(b) The star witness in the case as per the prosecution case is P.W.12, and the basis for the conviction of A-2 was the statement given by P.W.12 under Sec.67 of the NDPS Act coupled with the evidence of P.W.13 Sam Immanuel. The statement is alleged to have been given to the preventive officials namely P.Ws.1 and 50. Both the witnesses P. Ws.12 and 13 did not support the prosecution, and they turned hostile. But, the evidence of P.Ws.12 and 13 has fully probablised the case of the defence. They have clearly spoken to the effect that those statements were obtained by them on the tutoring of the preventive officials who are the prosecuting agency in the instant case, and hence, no reliance can be placed on their evidence to connect the second accused in the crime in question. To prove the offence under Sec.193 of I.P.C. with regard to the charge No.5, the prosecution has examined, P.W.15, 26, 33, 36, 37, 41, 43, 44, 46 and 47. All the witnesses did not support the prosecution case, nor have they referred the second accused or identified her in the Court. Hence, their evidence cannot be relied on for the purpose of convicting A-2. Ex.P205 is the requisition letter from NCB Officials to Special Divisional Engineer (Telephones) for obtaining the printouts of telephone department with regard to the telephone connections available in the house of A-2. Exs.P207, P208 and P224 the printouts of the telephone department given to the NCB Superintendent were obtained first on 23.7.98, and thereafter P.W.12 Dominic was examined by the preventive officials on 24.7.9 8 under Sec.67 of the NDPS Act, which shows that it was not the Dominic who gave information first, from which the telephone printouts have been traced. The printouts have been obtained earlier before the Dominic was examined under Sec.67 of the NDPS Act. This would show that Ex.P73 could not have been obtained in the manner, date, time and place as alleged by the NCB officials. Thus, the said documents are belated and fabricated to suit the prosecution story.

(c) P.W.12 Poppu Elango, Assistant Commisioner of Central Excise has clearly deposed in the cross examination that as per Ex.P112 given by him, the second accused has left her duty at Tanjore and afterwards on 8.5.98 during holidays, she did not obtain any permission to visit her native place, and if she wanted to leave the headquarters, she has to get permission from the department, and there was no such permission obtained by her, and on 8.5.98 at the time of transfer, there was a farewell party given to her. Hence till 8.5.98 A-2 was available only at Tanjore, in which case the conversation alleged to have been made by A-2 with P.W.12 on 7.5.98 could not have been made from Nagercoil, which cuts the case of the prosecution. It was pointed out by the prosecution before the trial Court that the second accused was absconding; and that she was not available in her native place. In order to prove the same, the prosecution has examined P.Ws.17, 20, 21 , 23, 24, 25, 30, 32, 34, 38 and 42. The second accused was taking all steps available under law to protect her interest by filing anticipatory bail petitions before this Court. Subsequently a direction petition preventing from effecting arrest against her was filed, and a quash petition was also filed by ber before this Court as against the complaint filed by the NCB Officials. The mere allegation that the second accused was absconding all along was not true. She was effectively taking steps under the provisions of the law which cannot be termed as absconding. The allegations of abscondance cannot be taken as a circumstance against the second accused for inferring that she was guilty of the offence alleged against her. The Apex Court has held in its

pronouncements that mere abscondance will not give an inference that the person who was absconding was guilty of an offence. In this case, even the allegations of abscondance are not admitted, and the allegations do not have any legs to stand before the scrutiny by this Court. There is no legal evidence connecting the second accused with the crime for constituting the ingredients of charges of Sec.29 of the NDPS Act, Sec.27-A of the Evidence Act and Sec.28 of the NDPS Act. Thus, the lower Court was perfectly corr ect in acquitting her of the charges against her under Sec.193 of I.P.C., and the appeal filed by the State has got to be dismissed.

7. In support of his contentions, the learned Senior Counsel has relied on the following decisions:

1) AIR 1941 PC 16; 2) AIR 1971 SC 44; 3) AIR 1981 SC 911; 4) 2000 SCC (CRI) 496; 5) JT 2002 (7) SC 245; 6) 1995 SCC (CRI) 466; 7) AIR 195 2 SC 369; 8) 2002 (4) CTC 141; 9) AIR 1965 SC 1251; 10) 1959 (2) MLJ 165 and 11) 1996 SCC (CRI) 489.

8. Answering to the above contentions of the appellants' side, the learned Special Public Prosecutor Mr.P.N.Prakash with vigour and vehemence made the following submissions:

(i) The appellants who are husband and wife are the Superintendents of Central Excise and Customs Department, and thus they were worldly-wise and cannot be equated to an ordinary and ignorant layman. The prosecution has come with the specific case that on 8.5.98 on receipt of information from P.W.12, P.W.50 accompanied by P.W.1 proceeded to the Thiruchenduran Mansion and found the room No.116 where A-1 was staying, locked. P.W.50 asked P.W.1 to secure an independent witness. P.W.1 brought P.W.7 Thalayari to Thiruchenduran Mansion. At about 1 2.00 P.M. A-1 had gone inside the room in the Mansion. At about 12.1 0 P.M., they tapped the door of that room. A-1 was found the room. After following the procedural formalities, as contemplated under the law, they seized the contraband namely 2 kgs. of heroin, which was in the illegal possession of A-1, under Ex.P1 mahazar. The same was signed by P.Ws.1, 50 and two witnesses namely P.Ws.6 and 7. After serving a copy of the mahazar on A-1, they took him to the Deputy Commissioner's Office at Madurai, where his statement was recorded, and then, he was remanded to custody.

(ii) It is not in dispute that the said contraband was recovered from A-1 after strictly following the procedural formalities. It was done by P.W.50 in the presence of P.Ws.1, 6 and 7. The fact that a copy of the mahazar was served on A-1 immediately is also not disputed by the first accused. It is true that the mahazar witnesses namely P.Ws.6 and 7, P.W.12 the informer and P.W.13 have turned hostile. Sec.53A(1)(b) of the NDPS Act very well empowers the Courts to admit the statements given by those witnesses as evidenc e in the interest of justice. The statements recorded under Sec.67 of the N.D.P.S. Act are more than a statement recorded under Sec.161(3) of Cr.P.C. or Sec.164 of Cr.P.C. Statements recorded under Sec.161(3) Cr.P.C. are not signed by the parties. They are recorded in the handwriting of the Police Officers, while the statements under Sec.164 of Cr.P.C. though placed in a better position than under Sec.161(3) of Cr.P.C., have been recorded by the Judicial Officers after giving due warning in the case of an accused, and they are also used either for contradiction or corroboration only in the circumstances when the witness retracts his previous statement.

(iii) Sec.53A of the NDPS Act is pari materia to Sec.138B of the

Customs Act. In the Course of administration of revenue enactments like the Customs Act, Gold Control Act, people come forward to pass with the information during the time of investigation. But, once the trial commences, the smugglers create fear in the minds of the witnesses by causing illegal threat, and so many of them turned hostile to the prosecution. The revenue officials cannot give protection to the witnesses, since the protection is a law and order problem falling exclusively under the domain of the police. The frequent failure in prosecuting the smugglers in a Court of law on account of the witnesses turning hostile caused deep concern in the minds of the Parliament, and the same necessitated to introduce Sec.138B in the Customs Act. There was an amendment introducing Sec.53A in the NDPS Act, and hence, the statements recorded by the NCB Officials under Sec.53A from a witness is a substantive piece of evidence. The object and scope of Sec.138B of the Customs Act is applicable to Sec.53 of the NDPS Act.

(iv) In the instant case, all the statements were written by the witnesses in their own handwriting and signed by them also, and the prosecution has also proved that they were free from threat, influence or coercion. The very object of the introduction of the Section was to make a departure from the traditional concept of criminal jurisprudence, and hence, though the witnesses have turned hostile, it was to be treated as a substantive piece of evidence. Therefore, the contention of the appellants' side that since the witnesses have turned hostile, it cannot be taken as a substantive piece of evidence has got to be rejected.

(v) In the instant case, the first appellant/A-1 has not only denied the prosecution case, but came with a false theory stating that on 8 .5.98 around 10.00 A.M., he received an information that a person carrying 2 kgs. of heroin was standing near Vasantha Nagar bus stand; that in order to work out the information, he had gone to the place in his Office Jeep, which was driven by P.W.8 Sepoy around 11.30 A.M., that on seeing A-1, the person carrying the plastic bag has dropped it and fled; that though A-1 attempted to apprehend him, he could not; that A-1 picked up the packet and called two persons namely Sekar and D.W.4 Mani to be the witnesses; that along with those witnesses he had gone to his room; and that at that time P.Ws.1 and 50 made entry into his room and seized the contraband in question. Thus, two theories were before the Court one by the prosecution and the other by the defence. The prosecution by adducing sufficient evidence has not only proved its case, but has proved the defence theory intrinsically unbelievable. The appellants relied on the version of A-1 in Ex.P1 mahazar, his statement under Sec.67 of the NDPS Act marked as Ex.P183, the statement under Sec.164 of Cr.P.C. of P.W.8 marked as Ex.P60 and the evidence of P.W.8 and D.W.4. There are so many circumstances available to indicate that the drop theory put forth by the appellants/ accused was unbelievable and false. A-1 has not recorded the alleged information he received, nor has he taken with him any Officer for assistance in his operation, nor has he informed P.W.3 Srinivasan about his mission. He has not taken with him all drug testing kits, etc. It is highly improbable that A-1 who was admittedly on orders of transfer on 8.5.98 has left the Office stating that he would come back by 12.30 and hand over the charge to P.W.2 Periyasamy, who came to succeed him. It was highly strange that an anonymous carrier was standing in a crowded bus stand, where there was police patrol on account of a function in a nearby marriage hall.

(vi) The conduct of A-1 to go to a shop for purchase of M.O.10 bag on

his route throws a considerable doubt. It is pertinent to point out that the contraband seized from him was in M.O.10 bag kept in his room. The earliest document recorded by the officials was the mahazar, wherein the alleged drop theory propounded by A-1 is found a place. But, it remains to be stated that at that time, he did not say that he brought two witnesses by name Mani and Sekar. But, he subsequently introduced those two names in Ex.P183 statement recorded under Sec.67 of the NDPS Act. It has to be pointed out that those two persons were introduced as if they were totally unknown to him. These two witnesses in their statements under Sec.164 of Cr.P.C. marked as Exs.2 01 and 203 respectively have stated that they were waiting for a bus to Thiruparankundram, and they were called by A-1 to be a witness. It has been clearly established from the evidence of P.W.5 Sekar, P.W.39 Loganathan and Exs.P21 and P45 mahazars that the said Sekar was well known to A-1 even previously. Despite the earnest efforts, the said witnesses could not be secured. Despite the receipt of summons under the NDPS Act, they have chosen to give statements under Sec.164 of Cr.P.C. and have sent two letters under Exs.P215 and P178A to the NCB Office where they have asked the NCB Officers to accept the statement given under Sec.164 of Cr.P.C. as statement of facts. P.W.50 has categorically deposed that he was maintaining surveillance near Thiruchenduran Mansion and himself had seen A-1 getting down from the Jeep and walking straight towards the mansion, and there was no such incident as contended by A-1. The statement of P.W.8 Vivekanandan recorded under Sec.67 of the NDPS Act has also corroborated the version of P.W.50. All the above would go to show that the drop theory propounded by A-1 was false.

(vii) The prosecution has clearly proved through necessary evidence, the factum of conspiracy hatched up by A-1 and A-2 who are not only Senior Officials of Central Excise and Customs Department, but also husband and wife. It is an admitted fact that P.W.12 Dominic has been an informer for A-2. The involvement of A-2 in the scheme of conspiracy was disclosed by P.W.12 to P.W.50 while giving information on 8.5.98. The information report was marked as Ex.P73. In this regard, the evidence of P.W.48 Sivasankaran, who was the Sub-Divisional Engineer, Thuklay Telephone Exchange in Mary 1998 would reveal that two telephones were functioning from the residence of A-2 at No.41-D, Aloor Road, Chungankadai; and that the telephone calls were made from the residential telephone of the accused to the residential telephone of P.W.12 as shown by Exs.P207 and P208. A letter under Ex.P72 wherein P.W.12 has stated that he had been an info rmer for A-2 in an earlier case investigated by A-2 in Customs Crime No.3/96. P.W.12 has also disclosed in his statement under Sec.67 of the NDPS Act that on 7.5.98 A-2 had telephoned him twice and sought his help for transporting 2 kgs. of heroin from the possession of her husband; and that when he declined, she asked him to contact P.W.13 in that regard. P.W.13 has also in his statement under Sec.67 of the Act marked as Ex.P79 has corroborated the version of P.W.12, inasmuch as he has declined to concede the request of A-2.

(viii) At the time of trial P.W.12 came with a false version that he was asked by the Officials of NCB to write Ex.P72 letter and give a fabricated statement as found under Ex.P76. It remains to be stated that on 14.5.98 P.W.12 has gone to Valliyoor Police Station and lodged Ex.P74 FIR, wherein he has alleged that A-2 was making an attempt on his life after coming to know that he was the informer. In Ex.P74, he has nowhere denied that he was the informer in this case. On investigation, the police has also filed a report

before the competent Court arraying A-2 as A-1 therein. P.W.12 has also filed a petition under Sec.482 of Cr.P.C. in this Court praying for a direction to arrest A-2. He has admitted this fact in his evidence. This would go to show that this was not at the instigation of the NCB officials. The above factors would indicate that P.W.12 has turned hostile and has given false version before the Court, despite his earlier statement. P.W.13 Sam Immanuel in his earliest statement under Ex.P79 which was recorded as early as 11.6.1998 disclosed that he was asked by A-2 to accomplish the task of transporting the heroin from the possession of A-1. P.W.13 in order to protect himself has sent a telegram under Ex.P78A though in his evidence has denied the same. On 7.6.98 a person by name Thillairajan appeared before P.W.51 and gave a statement that his friend Sam Immanuel was intending to come to Chennai, but was prevented by the henchmen of A-2. In fact P.W.13 did not go over to Chennai. P.W.51 thought it fit to go over to his residence where P.W.13 submitted Ex.P82A and P83A documents. Though P.W.13 has turned hostile to the prosecution case and has stated that he gave a statement as dictated by P.W.51, his version if tested in the light of various facts, would be falsified. He has given the Department a manuscript of a letter under Ex.P82A written by A-2 to be sent to the higher officials complaining against one Amalraj. A comparison of Ex.P82A and the statement given by A-2 in jail under Ex.P149 would clearly show that Ex.P82A was written by A-2. These documents namely Exs.P82A and P83A would throw light about the alleged activities of one Amalraj an Officer in the Customs Department.

(ix) A-2 in her written statement under Sec.313 of Cr.P.C. has stated that the instant case was foisted at the instance of J.M.K.Sekar and Amalraj. The internal evidence found in those documents is supported by the reference about Amalraj in her own statement under Sec.313 Cr.P.C. It is pertinent to point out that P.W.13 Sam Immanuel has not completely repudiated the fact that he has given any statement at all, but has only stated that he has given a statement as dictated by P.Ws.12 and 51. Had it been the intention of P.W.51 to obtain an untruth statement from P.W.13, he would have taken care to see that the father's name of Sam Immanuel and other details were correct. Hence, the assertion of the prosecution that Sam Immanuel was threatened by A-2 and was coerced and forced to turn hostile to the prosecution during the course of trial deserves to be accepted. Out of 52 witnesses examined by the prosecution, 12 witnesses have turned hostile, and out of 12, 4 of them have gone to the extent of giving statements under Sec.164 of Cr.P.C. in order to torpedo the prosecution case. From the analysis of the statements under Sec.67 of the NDPS Act, it would be abundantly clear that A-2 informed that A-1 was in possession of the contraband, and A-2 has taken steps for transporting it safely from the possession of A-1, and therefore, A-1 and A-2 have conspired to traffic the 2 kgs. of heroin, the subject matter of the proceedings.

9. Assailing the judgment of the trial Court acquitting A-2 under Sec. 27A of the N.D.P.S. Act and Sec.193 of I.P.C., the learned Special Public Prosecutor made the following submissions:

(i) The lower Court without proper appreciation of the position both legal and factual has acquitted the accused. Sec.193 of I.P.C. can be invoked for giving false evidence in a judicial proceedings and fabricating false evidence with an intention to use it at any stage of judicial proceedings. In the instant case, the act of the second accused falls under

the second category namely fabricating false evidence with an intention to use it at the subsequent judicial proceedings initiated against them. The specific case of the prosecution is that in order to use the evidence of P.W.6 Krishna Rao, P.W.7 Ayyannan, P.W.8 Vivekanandan, Mani, Karuppiah, Sekar and P.W.33 Prabhakar in favour of the accused, if the trial commenced before the Special Court on a complaint by the NCB, A-2 has made those persons to give false statements under Sec.164 of Cr.P.C. before the learned Magistrates. The Hon'ble Supreme Court has clearly held that the statements under Sec.164 of Cr.P.C. cannot be recorded at the instance of the private individuals, and only Police Officers can request to record the statement. In the light of the legal position enunciated by the Supreme Court in a case reported in (1999) 4 CRIMES 12 (JODENDRA NAHAK VS. STATE OF ORISSA), it would be relevant to analyse the materials on record to establish a charge against A-2. (ii) The prosecution has examined P.W.15 Udayasuriyan and P.W.33 Prabhakaran who have spoken about the activities of A-2. P.W.33 a Tuticorin based Car broker and a real estate agent, owned an Ambassador Car bearing Registration No.TN-31-Y-3906. P.W.33 has well admitted this fact in evidence and his statement under Sec.67 of the NDPS Act marked as Ex.P161. He has given a graphic description of the places visited by A-2 in procuring the witnesses. In that exercise, his Car has been used, and the same was driven by P.W.15. Though P.W.33 has turned hostile, the statement recorded under Sec.67 of the NDPS Act reflects the true picture of his evidence in the witness box. It is pertinent to point out that P.W.33 has accepted that he has given the statement written in his own handwriting, but has stated that he was tortured by P.Ws.50 and 51 and was wrongfully confined in Alwyn Lodge till 2.6.1998. Admittedly, there was no previous enmity or animosity between P.W.33 and the NCB Officials. Hence, there was no necessity for the NCB Officials to pick and choose P.W.33 for the purpose of making a false statement against A-2 . P.W.33 was arrested by Valliyoor Police on 1.6.98 as deposed by P.W.49 Sheik Ahamed in connection with the complaint given by P.W.12. Pursuant to his arrest on 1.6.98, his Ambassador Car bearing Registration No.TN-31-Y-3906 was recovered by the Valliyoor Police on 1.6.98 following the disclosure made by P.W.33 under Sec.27 of the Evidence Act. P.W.33 was remanded to judicial custody on 2.6.98 in connection with the said case. Therefore, the contention of P.W.33 that he was kept in illegal confinement till 2.6.98 at Alwyn Lodge, Tuticorin can at no stretch of imagination be true. In his statement P.W.33 has categorically spoken about the fact that he stayed in various lodges in Madurai and Chennai. This fact is independently corroborated by his own admission in the witness box, apart from the evidence of P.W.19 Kathirvel and P.W.36 Sekar. From the analysis of the evidence, it would be clear that his version in Ex.P161 statement was more reliable than the subsequent evidence in Court, wherein he has totally denied that he knew A-2 at all.
(iii) Equally P.W.15 Udayasuriyan has sent a telegram to NCB Office marked as Ex.P88A in which he has stated that A-2 was tampering with the evidence. He has sent identical telegram to the Court marked as Ex.C2. He has well admitted in his chief e nation of having sent Ex.C2, but strangely denied Ex.P88A. At the time of cross examination, he has denied Ex.C2 also. It is pertinent to note that it was he who drove the Car with A-2 and P.W.33 to various Courts for procuring witnesses and getting their statements recorded under Sec.164 of Cr.P.C. After coming to know that he was being searched by the officials, in order to safeguard himself, he has sent both the

above telegrams. The dates on which P.W.15 drove the Car and took the witnesses to various Courts were corroborated by the fact that on those dates the statements under Sec.164 of Cr.P.C. have been recorded by the respective Magistrates. P.W.15 in the course of his statement marked as Ex.P90 has categorically stated all the facts. He has also stated in his statement that A-2 was informed by the Advocate that he has made arrangements to send the statements under Sec.164 of Cr.P.C. recorded by the Magistrates to the Special Court belatedly, and the Magistrate at Musiri would get transferred, and therefore, the other witnesses must be brought before that. The learned Judicial Magistrate, Musiri examined as P.W.47 has categorically deposed that on 13.5.98 he recorded the statements of Karuppiah, Mani and Sekar, and those statements were sent to the Special Court only on 29.5.98. It is pertinent to point out that the said Magistrate has worked at Musiri till 31.5.98 and thereafter, he was transferred. All would go to show that the statement given by P.W.15 was true.

(iv) The contention of the appellants' side that a case has been engineered by one J.M.K.Sekar against A-2 has been nursing certain grievances has got to be necessarily rejected. The said J.M.K.Sekar was an Officer of the Customs Department, under whom A-2 has worked sometime back, and there were some litigation between them. But, it is pertinent to point out that P.W.50 and his superior officer T.Rajendran have come on deputation from the State Police. That apart, number of prosecution witnesses namely P.Ws.1, 30, 31, 37, 45, 51 and 52 are all Officers hailing from the same Department of both the accused. Number of witnesses examined were actually working in the same Department of both the accused and have supported the prosecution case. The appellants are unable to show any reason ro circumstance why these witnesses joined hands with P.W.50 in order to foist a cast against a member of their own parental Department, and thus, the mere allegation of mala fide by suggesting questions to witnesses was not a proof of the same. The accused have not discharged the burden by proving the existence of mala fide by adducing convincing and acceptable legal evidence. It would be relevant to state that A-2 in her statement recorded in jail marked as Ex.P149 has nowhere stated that the case was foisted at the instance of J.M.K.Sekar. The allegation by the accused that the case has been foisted at the instance of J.M.K.Sekar and Amalraj cannot be true because the informer in the case namely P.W.12 has himself filed a writ of Quo-Warranto against J.M.K.Sekar and Amalraj, and the said writ petition was dismissed by this Court.

(v) The appellants have examined four witnesses. D.W.4 was examined in order to support the alleged seizure by A-1. But, it has not inspired the confidence of the Court. It has been established that Sekar was a mahazar witness to A-1's earlier seizures. But, it is strange that A-1 has not even recognised Sekar on 8.5.98, and Sekar has never told D.W.4 that he knew A-1. There was no necessity to D.W.4 to join hands with Karuppiah for giving statement under Sec.164 of Cr.P. C. D.W.4 has stated that A-1 told him that his Office was nearby and asked D.W.4 and Sekar to get into the Jeep. But, according to A-1, they were taken to Thiruchenduran Mansion. It is pertinent to point out that D.W.4, Sekar and Karuppiah have obtai ned loans for giving Sec.164 Cr.P.C. statements at different places in the State. They could have easily given their version of the case by writing registered letters to NCB. Thus, all these circumstances, put together, would clearly show that D.W.4 was very close to the accused and Madhavan of Thiruchenduran Mansion. The

prosecution has proved the charge under Sec.27A of the NDPS Act against A-2 for having financed for transporting the said contraband from Madurai to Nagercoil, by adducing evidence through P.W.13 and Ex.P79. Therefore, the prosecution has proved its case beyond reasonable doubt, and the appeal filed by the appellants/A-1 and A-2 has got to be dismissed, and the appeal filed by the State has to be allowed and A-2 be convicted under Sec.193 of I.P.C.

10. In support of his contention, the learned Special Public Prosecutor relied on the following decisions:

1) 1992 L.W. (Crl.) 625; 2) 1993 (3) SCC 609; 3) (1998) 2 SCC 192; 4) (1994) 4 CRIMES 12 and 5) 2002 (4) CRIMES 160 (SC).

11. This Court has made a complete and careful analysis of all the materials available and paid its full attention on the elaborate deliberations put forth by both sides.

12. The facts which are not in controversy can be extracted as follows:

The appellants in C.A.868 of 2000 arrayed as A-1 and A-2 are husband and wife respectively. The permanent residential address of A-1 and A-2 was No.41-D Alloor Road, Chunkankadai, Kanyakumari District. They were working as Superintendents in the Central Excise and Customs Department and were gazetted officers. While working at different places, they have registered and investigated several cases under the N.D.P.S. Act. During the relevant point of time, A-1, who was working as the Superintendent of Customs, Madurai, was residing at Room No.116, Thiruchenduran Mansion, Vasantha Nagar, Madurai, while A-2 was working as Superintendent at Tanjore. A-1 was under the orders of transfer on 8.5.1998, and P.W.2 S.Periyasamy was his successor. P.W.3 A.Srinivasan and P.W.5 R.Sekar were the subordinates, while P.W.4 R. Sri Ram was the immediate official superior of A-1 that day. On the date of occurrence namely 8.5.1998 at about 12.00, noon P.W.1 G. Shanmugam and P.W.50 S.S.Krishnamoorthy went to Room No.116, Thiruchenduran Mansion and recovered 2 kilograms of heroin from the possession of A-1 under Ex.P1 mahazar, and a copy of the seizure mahazar was served on A-1. A-1 has given a statement under Sec.67 of the N.D.P.S. Act, marked as Ex.P183, which was written and signed by him, and he has received a copy of the same also. A-2 was continuously absent from 8.5.1998 onwards. After arrest, A-2 has given a statement under Sec.67 of the N.D.P.S. Act marked as Ex.P149, which was written and signed by her, and she received a copy of the same. The prosecution witnesses who have given statements under Sec.67 of the N.D.P.S. Act during investigation have well admitted that the statements were written and signed by them.

13. At the outset, it has to be necessarily stated that on 8.5.1998 at about 12.00 noon, around 2 kilograms of heroin, the contraband involved in this case was in the possession of A-1 at Room No.116, Thiruchenduran Mansion, Vasantha Nagar, Madurai, which was in the exclusive occupation of A-1; that the Intelligence Officers of the complainant Department searched the said room; and that at that time A-1 produced the said 2 kilograms of heroin, which was seized under Ex.P1 mahazar, a copy of which was served on A-1. The prosecution has come forward with a specific case that A-1 at that time and place was in illegal possession of the said contraband namely 2 kilograms of heroin, and thus, punishable under the provisions of the N.D.P.S. Act, while the first appellant/A-1 took a plea that the said narcotic drug was recovered

by him pursuant to an information by way of a seizure at Pazhanganatham bus stop, 150 feet away from his lodge, a few minutes earlier to the seizure by the NCB officials in his room. Thus, there are two theories of seizure, one put forth by the prosecution and the other by the defence.

14. Admittedly, the seizure of the contraband in question was made by the officials in Room No.116, Thiruchenduran Mansion under Ex.P1 mahazar, and the said room was in the exclusive occupation of the first accused at the time when the seizure was made. At this juncture, it would be more appropriate to reproduce Sec.35 of the N.D.P.S. Act which speaks of the presumption of culpable mental state:

"35. Presumption of culpable mental state:- (1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation:- In this section "culpable mental state" includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

From the very reading of the Section, it would be clear that in any prosecution for an offence under the Act, if it requires a culpable mental status of the accused, the Court should presume the existence of such mental state, but it is for the accused to prove the fact that he had no such mental state with respect to the act accused of an offence in that prosecution. According to the said provision, the culpable mental state would include the intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. In the instant case, the prosecution by adducing evidence through P.Ws.1 and 50 and through the admissions made by A-1 in his statement recorded under Sec.6 7 of the NDPS Act and Sec.313 Cr.P.C. questioning before the trial Court has proved that A-1 was in possession of the contraband in question.

15. No doubt the prosecution is obliged to prove it by cogent, reliable and acceptable evidence that the person alleged to have knowledge of the said fact was having that knowledge and that should be proved beyond reasonable doubt. It would mean that any other proposition indicative of the non existence of knowledge has to be ruled out. This would require letting in evidence to enable the Court to come to the conclusion on the question whether it existed. If this test is applied, the Court is very much satisfied that the prosecution has proved the existence of the same beyond reasonable doubt by adducing positive evidence discussed infra.

16. In order to prove its case, the prosecution has examined 52 witnesses out of whom 12 witnesses have turned hostile. It is true that both the witnesses to the seizure namely P.Ws.6 and 7 have turned hostile. They have gone to the extent of stating that their signatures were obtained in Ex.P1 mahazar only on 9.5.1998 at the Office of the Deputy Commissioner of Police, Madurai. It is pertinent to point out that they have given their statements originally, and the same was also recorded. Much comment was made by the appellants' side that the names of those witnesses have been subsequently added at the top of Ex.P1 mahazar by using a different ink. This contention cannot be accepted for the simple reason that A-1 has made an

endorsement acknowledging the receipt of a copy of the mahazar. Had the names of the witnesses been subsequently introduced according to the convenience of the Department, a person like A-1, who happened to be the Superintendent of Customs that day, would not have received a copy of the same. He has not complained at any point of time about such inclusion of the names of those two witnesses subsequently. From the evidence of P.W.50 Assistant Director of NCB, it would be clear that on a telephonic message received by him on 7.5.98 at about 2.10 P.M. from his informer P.W.12 Dominic, he accompanied by P.W.1 Intelligence Officer Shanmugam proceeded in a Car to Madurai; that after reaching Madurai, they could not meet the informer near Pazhanganatham bus stand, and then they proceeded to Radhapuram; that when they reached Valliyoor, they tried to contact P.W.12 through phone, which was attended by P.W12 's father; that he replied that his son P.W.12 was waiting in the petrol bunk situated near Madurai Palanganatham bus stand and they could meet him there; that P.W.50 accompanied by P.W.1 returned to Madurai, met P.W.12 at about 7.00 A.M. and reduced the information into writing seating inside his Car; that P.W.50 took a copy of the said information, and the original was kept in a sealed cover; that the copy of the information taken by P.W.50 was marked as Ex.P73; that at about 7.45 P.M., P.W.50 went to the nearby STD booth and contacted his Head Office through phone and informed to P.W.52 about the information he received and directed P.W.52 to communicate the same to the Director of N.C.B.; and that a printout in respect of the telephonic communication issued by the STD Booth is marked as Ex.P209. The contention of the appellants' side that Ex.P209 was only a created one for the purpose of the case cannot be accepted for the reason that even this information to P.W.52 by telephonic communication was referred to in the earliest report given by him. It is the further evidence of P.W.50 that at 8.15 P.M. when P.Ws.1 and 50 proceeded to Thiruchenduran Mansion, they found the room locked; that P.W.50 directed P.W.1 to fetch one independent witness for the purpose of seizure, but, P.W.50 was waiting there keeping surveillance over the said place; that at about 11.30, he found the first accused came in his official Jeep, got down at Vasantha Nagar bus stop and proceeded to the Thiruchenduran Mansion with the plastic bag marked as M.O.11 being rolled and kept in his hand; that at about 11.00 A.M. P.W.1 and P.W.7 Ayyannan, a village assistant, came there; that P.W.7 agreed to be a witness for the investigation; that when P.W.6 Krishna Rao, the Manager of the said Mansion was contacted, he was also prepared to be a witness; that then P.W.50 accompanied by P.W.1 and the two independent witnesses P.Ws.6 and 7 proceeded to the upstairs where the room of A-1 was situated; that they found the room locked inside; that they tapped the door, and when A-1 opened the door, P.W.50 introduced himself to the first accused, and after following the procedural formalities as contemplated under Sec.50 of the N.D.P.S. Act, the search was made; and that when P. W.50 asked A-1 whether there was any contraband inside the room, A-1 took out M.O.11 rose coloured polythene bag containing 2 packets inside M.O.10 cloth bag which was kept on the cot and handed over the same to P.W.50 and told that it contained the narcotic drug heroin, and would further add that it was seized by him a few minutes before at Vasantha Nagar bus stop. At this juncture, it has to be necessarily mentioned that A-1 at no point of time has complained that the procedural formalities as contemplated under the provisions of the N.D.P.S. Act were not followed by the officials. In the presence of those two witnesses, the contraband was seized under Ex.P1 mahazar along with the

samples marked as M.Os.2, 3, 5 and 6.
17. It is true that P.Ws.6 and 7 have turned hostile. The factum of preparation of Ex.P1 mahazar at Room No.116, Thiruchenduran Mansion which was in the exclusive occupation of A-1 at the time of seizure by the officials of the Department is not disputed by A-1. A perusal of Ex.P1 would clearly indicate that A-1 was served with a copy of the same. It is not the case of A-1 at any point of time that copy of Ex.P1 was not served at that time. As pointed out above, according to the prosecution, the names of the two witnesses though written in a different ink, were written at that time, in the presence of those two witnesses in Ex.P1. It was contended by the appellants' side with vigour and vehemence that Ex.P1 mahazar which is the basis for the recovery of the contraband, loses all its value and significance in a case like this, when both the mahazar witnesses have turned hostile. The Court is unable to agree with the said contention. Firstly, a copy of Ex.P1 mahazar was served on A-1. The said mahazar contained the names of the two witnesses. If the witnesses were either not present or their names were not included in Ex.P1 mahazar, A-1 would not have received the copy of an incomplete document. The service of Ex.P1 at that time would be pointing to the presence of those two witnesses as spoken to by P.Ws.1 and 50, and thus, Ex.P1 mahazar was a complete document including the names of those two witnesses. It is pertinent to point out that the statement of those witnesses have been recorded. For the reasons best known to them, those witnesses have turned hostile, and they have gone to the extent of stating that they have put the signature on 9.5.98 in the Office of the Deputy Commissioner. In view of the reasons stated above, it has to be held that the seizure was properly done in the presence of those two witnesses under Ex.P1 mahazar. After the seizure was made, A-1 was taken to the Office of the Deputy Commissioner, Madurai, where a statement under Sec.67 of the NDPS Act was recorded by the NCB officials, and following his arrest, he was produced before the concerned Judicial Magistrate's Court along with the contraband, where he was remanded to judicial custody. 18. It is the contention of the ap pellants' side that the case of the prosecution that P.W.50 on receipt of an information at Madras proceeded to Madurai with P.W.1 and then proceeded to Valliyoor and came back to Madurai, met P.W.12 Dominic, got information from him, pursuant to which the search was made are all stories invented by the prosecution in order to foist a case against the accused. The Court is unable to agree with the said contention. Had it been the desire of the Department to foist a case against A-1, it was not necessary for the officials like P.W.50, Assistant Director of the Department to proceed with his Intelligence Officers immediately by a Car and proceed to Valliyoor and came back to Madurai. It is true that P.W.1 2 Dominic has turned hostile. But, it remains to be stated that P.W.12 has well admitted in his evidence that he met P.W.50 on 8.5.98 morning and gave an information. Though P.W.12 has denied the contents of the information as put forth by P.W.50, from the evidence of P.W.5 0 it would be clear that it was pursuant to the information they have acted and seized the contraband from A-1. Hence, the Court is of the considered view that though P.Ws.6 and 7 mahazar witnesses and the informer P.W.12 have turned hostile, no way it has affected the truth of the prosecution case, since the prosecution has proved the illegal possession through the evidence of P.Ws.1 and 50 and the documentary evidence relied on by them as referred to above. The appellants are unable to show any reason or circumstance to disbelieve or reject the testimony of P.Ws.1 and 50. Both the

accused in the case are in the rank of Superintendents of Customs and Excise. It is not the case of the appellants that any one of the witnesses examined by the prosecution was on inimical terms or had got animosity against them. Apart from the positive evidence as narrated above, it is pertinent to point out that the said contraband at the time of seizure was found in Room No.116, Thiruchenduran Mansion, which was in his exclusive occupation, and hence, the knowledge of A-1 as to the possession of the said contraband at that time cannot be disputed by him. Hence, there cannot be any legal impediment in drawing a presumption as to the existence of the culpable mental state of A-1 at that point of time in view of the positive evidence adduced by the prosecution as discussed above.

19. It is true that the defence for A-1 was available to prove that he had no such mental state with respect to the said possession. In such a situation, what are all expected to be proved by the accused that he had no such mental state was only the existence of preponderance of probabilities and not proving the same beyond reasonable doubt. There is lot of difference between preponderance of probabilities and beyond reasonable doubt. The first appellant/A-1 in his attempt to disprove the presumption has come with a plea stating that on 8.5.9 8 at 10.00 A.M., when he was in his Office, he received an information that a person carrying 2 kilograms of heroin was standing near Vasantha Nagar Bus Stand; that with an idea to work out the same, he had gone to the place in the Office Jeep driven by P.W.8 Sepoy-cumDriver around 11.30 A.M.; that on seeing A-1, the person carrying the plastic bag dropped it and fled; that though A-1 chased him, he was unable to catch him; that A-1 returned to the place, where the bag was dropped; that he called two persons namely D.W.4 Mani and Sekar to be witnesses; that along with those witnesses, he came to his Room No.116, Thiruchenduran Mansion, which is situate very nearby, but at that time P.Ws.1 and 50 entered into his room, and the seizure in question was made by P.Ws.1 and 50. Many are the circumstances which would indicate that the plea of A-1 namely the drop theory is highly improbable, unbelievable and cannot be accepted. Admittedly, at about 10.00 A.M. on 8.5.98, A-1 was on duty at his Office. According to A-1, only on receipt of an information that a person carrying 2 kilograms of heroin was standing near Vasantha Nagar bus stand, he wanted to proceed to that place. There is no satisfactory explanation on the side of A-1 why he did not either reduce the said information into writing or pass on the information to his superior Officer or inform P.W.3 who was his immediate subordinate well available in the Office that time. The explanation tendered by A-1 that it was a vague information, and hence, it need not be recorded has got to be discountenanced in view of his earlier recording of the informations under Ex.P19 report. It remains to be stated that in the earlier occasions though he received the information at his residence namely Room No.116, Thiruchenduran Mansion, he has gone over to his Office and recorded the information, and then he has proceeded to the particular spot. There is also no explanation tendered by A-1 why he did not employ the regular Driver of the Department. But, he has employed P.W.8 Sepoy-cum-Driver, who has subsequently turned hostile though gave a statement under Sec.67 of the NDPS Act. Though A-1 has started from his Office to work out the said information, he went to Khadi Bhavan and has purchased M.O.10 bag. If really A-1 had any information as stated by him, he would have rushed to the spot for apprehending the offender. This conduct of A-1 who was the Superintendent of Customs that time, was not only opposed to

the ordinary course of conduct what is expected of a reasonable person, but also cast a doubt on his conduct. Needless to say that the official who received the information, if not reaches the spot immediately, it would be nothing but enabling the offender escape from that place. It is pertinent to point out at this juncture that the seizure in question was made by P.Ws.1 and 50 from A-1. The contraband was actually kept in M.O.10 bag, which would be indicative of the fact that A-1 has gone to the shop for the purchase of M.O.10 bag only for the purpose of keeping the contraband in question. It is highly unbelievable that a person with 2 kilograms of heroin was standing at Vasantha Nagar bus stop, which was highly crowded that time and in particular when police patrol was made on account of a function in a nearby marriage hall. Admittedly, A-1 was to hand over the charge to P.W.2 Periyasamy, his successor in Office on 8.5.98. But, A-1 while he left the Office at 10'O Clock, has informed to P.W.3 to inform P.W.2 that he would be back by 12.30 P.M. and hand over the charge. If really A-1 left on the alleged information received by him, he could not have been sure of returning to the Office with a specified time. This would also cast a doubt on the alleged information received by A-1.

20. According to A-1, he took two persons namely D.W.4 Mani and Sekar from the Vasantha Nagar bus stop to his room for the preparation of mahazar for the seizure alleged to have been made by him. It is not in dispute that Ex.P1 mahazar was prepared at the time of seizure of the contraband in question by P.Ws.1 and 50 at Room No.116, Thiruchenduran Mansion, and a copy of the same was also served on A-1. Nowhere has A-1 stated the names of those two persons. These two persons both D.W.4 Mani and Sekar were introduced by A-1 at the time when he made his statement under Sec.67 of the NDPS Act, which was marked as Ex.P183. It is pertinent to point out tha t when he has referred to both the persons in the statement, he has stated as if those two persons were totally unknown to him, and they were requested to be witnesses suddenly. Through the evidence of P.Ws.5 and 39 and the mahazars under Exs.P1 and P45, it was proved by the prosecution that the said Sekar was well known to A-1 even prior to 8.5.98, and hence, it leaves no doubt that A-1 has introduced the names of those two persons at a later point of time. The non-mentioning of those two names at the time of the mahazar would clearly falsify that A-1 took both of them from Vasantha Nagar bus stop to Thiruchenduran Mansion as alleged by him. The contention of the appellants' side that A-1 actually made mention of those two names even at the time of recording of the mahazar under Ex.P1, but the officials of the Department have deliberately and wantonly omitted to include the same has got to be rejected in view of the fact that had it been the intention of the officials to act against him, the officials of the Department would not have included his defence plea of drop theory in the mahazar. This is another strong circumstance which would go against the defence plea. A-1 has not taken anybody to assist him in the operation, nor has he taken with him the necessary tools for testing the narcotic drug. It is highly improbable that at about 11.30 A.M. in a crowded public place like Vasantha Nagar bus stand, and that too in the presence of police patrol very nearby, the anonymous carrier on seeing A-1 ran from the place; and that though nobody else except A-1 chased him, the said person could not be caught. It is the case of the prosecution that the room of A-1 was locked inside; that P.Ws.1 and 50 knocked the doors; that when the same was opened by A-1, the contraband in question

namely 2 kilograms of heroin was in the possession of A-1, and the same was seized. Contrary to the above, it was contended by A-1 that he seized the same at the Vasantha Nagar bus stop, and for the preparation of mahazar, he took the same to his room. Had it been true that A-1 had made such a seizure at Vasantha Nagar bus stop as contended by him, he should have proceeded directly to his Office for the preparation of the mahazar, if he felt that it could not be done at the bus stop. Even he would have prepared the mahazar at the Office Room of the Thiruchenduran Mansion situated in the ground floor. There is no explanation as to which necessitated him to took the contraband directly to his room. At this juncture, it remains to be stated that P.W.2 Periyasamy, an Officer who was to take charge from A-1 would have waited for his arrival. All the above would be clearly indicative of the fact that this was only a false plea put forth by the first appellants/accused to escape from the grip and rigour of law. Therefore, without any hesitation it can be stated that the first appellant has miserably failed to rebut the said presumption as contemplated under Sec.3 5 of the N.D.P.S. Act.

21. According to the appellants, the instant case came to be foisted at the instance of one J.M.K.Sekar and Amalraj. On scrutiny of the available materials, it would be clear that the said plea of mala fide attributed to the prosecution had no basis at all. It is not disputed that A-2 the wife of A-1 has worked under J.M.K.Sekar in the past, and there were some litigations between them. It has to be necessarily stated that the instant case was registered and prosecuted by Narcotic Control Bureau (NCB) which had nothing to do with the Customs Department. P.W.50 and his superior officer have come to N.C.B. on deputation. That apart, about 20 witnesses out of 52 examined by the prosecution belonged to the Department of both the accused. Some of the witnesses are from the Department of Tele Communications also. The appellants are unable to show any reason why all those witnesses from different Departments and also from the Department of both the accused have come forward to adduce evidence against both of them. Apart from the above, when A-2 was in jail, her statement was recorded and marked as Ex.P149. Nowhere in the statement A-2 has mentioned that the instant case was foisted at the instance of J.M.K.Sekar and Amalraj. In the absence of any proof, it would be highly difficult to accept the defence plea of mala fide.

22. The appellants/A-1 and A-2 were charged under Sec.29 of the N.D.P.S. Act for having entered into a criminal conspiracy. On close scrutiny of the materials available, the Court is of the considered view that there are sufficient proved facts and circumstances, from which the existence of conspiracy could be well inferred. It would be more appropriate and advantageous to reproduce the following judicial pronouncements which speak about the law relating to conspiracy.

(i) It has been held by the Apex Court in a decision reported in 199 3(3) SCC 609 (AJAY AGGARWAL V. UNION OF INDIA AND OTHERS) as follows:

"24. Thus, an agreement between two or more persons to do an illegal act or legal acts by illegal means is criminal conspiracy. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons in furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. Conspiracy itself is a substantive offence and is distinct from the offence to commit which the conspiracy is entered into. It

is undoubted that the general conspiracy is distinct from number of separate offences committed while executing the offence of conspiracy. Each act constitutes separate offence punishable, independent of conspiracy....
25. A conspiracy thus, is a continuing offence and continues to subsist and committed wherever one of the conspirators does an act or series of acts. So long as its performance continues, it is a continuing offence till it is executed or rescinded or frustrated by choice or necessity. A crime is complete as soon as the agreement is made, but it is not a thing of the moment. It does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry into effect the design. Its continuance is a threat to the society against which it was aimed at and would be dealt with as soon as that jurisdiction can properly claim the power to do so."

(ii) This Court has held in a decision reported in 1992 L.W. (Criminal) 625 (STATE BY DEPUTY SUPERINTENDENT OF POLICE, CRIME BRANCH, C.I.D. HEADQUARTERS UNIT, MADRAS-4 V. S.THIRUNAVUKKARASU AND ANOTHER) thus:

"Conspiracy as a whole is brought about in secrecy and the proof of the same, by adduction of evidence direct, is really an impossible feat in most of the cases, though in the rarest of rare occasion, the possibility of obtaining such evidence is there. As such the conspiracy may be proved in most of the cases, by process of inference or induction from relevant proved facts and circumstances."

23. In the instant case it has to be necessarily stated that the following circumstances, no doubt, indicate the existence of conspiracy: The fact that P.W.12 Dominic, an informer to P.W.50 was originally an informer to A-2 also in a Customs case in Crime No.3/96 is not disputed by the appellants. P.W.12 has well admitted that he gave an information to P.W.50 to go over to Madurai on 7.5.98 and met P.W.50 on the morning of 8.5.98. Even in the information of P.W.12 which was reduced into writing by P.W.50 and marked as Ex.P73, the involvement of A-2 was referred to. P.W.12 has lodged a complaint before Valliyoor Police Station on 14.5.98, on the strength of which a case was registered as seen in Ex.P74 F.I.R. A perusal of Ex.P74 would clearly reveal that P.W.12 has alleged that A-2 was making an attempt at his life after coming to know that he was the informer to the Department. Nowhere has he stated in Ex.P74 that he was not the informer in respect of the incident in question. A-2 was ranked as A-1 in that case registered by Valliyoor police at the instance of P.W.12. P.W.12 has also admitted that he filed a petition before this Court under Sec.48 2 of Cr.P.C. as found under Ex.P77 seeking the directions of this Court to the Police to arrest A-2 alleging that the NCB Officers were lethargic in apprehending A-2, and if she was allowed to move about, his life would be in peril. P.W.12 in his evidence has well admitted that the said application was filed at his instance, and he has not stated that anybody else was responsible for the same. Had he not been the informer as urged by the prosecution, there was no need or necessity for him either to lodge a complaint before Valliyoor Police Station s found under Ex.P74 or to file a petition under Ex.P77 before this Court seeking a direction to arrest A-2. It has to be noted that the complaint was lodged under Ex.P74 by P.W.12 within a week from the date of arrest of A-1. The prosecution has examined P.W.48 Sivasankaran, who was a Sub Divisional Engineer, Thucklay Telephone Exchange. Through his evidence, it has been proved that the two telephones were functioning from the residence of the

accused at No.41-D, Aloor Road, Chungankadai; and that the telephone calls were made from the residential telephone of the accused to the residential telephone of P.W.12 as shown out in Exs.P207 and P208 printouts. In his statement recorded under Sec.67 of the NDPS Act, marked as Ex.P76, P.W.12 has disclosed that on 7.5.1998, A-2 has telephoned him twice and sought his help for transporting 2 kilograms of heroin from the possession of her husband namely A-1, but he declined to accede to the request; and that A-2 requested him to contact P.W.13 Sam Immanuel in carrying out the same. At this juncture, it has to be necessarily pointed out that P.W.12 though he was previously known and informant to A-2, has not only disobliged A-2, but has also passed on the information immediately on 7.5.1998 to the NCB Department at Madras. The prosecution has filed Ex.P72 letter written by P.W.12 Dominic to all the Enforcement Agencies in India seeking for protection. At the time of evidence, he came forward to state that the letter was written as asked by the Officers of NCB, which could not be believed in view of the available circumstances. P.W.13 Sam Immanuel though turned hostile, has admitted that he gave a statement to the Department, but it was as dictated by P.W.51. But, the prosecution has adduced Exs.P82, P82A and P83 A produced by P.W.13 at the time of enquiry. Ex.P82A was a manuscript of a letter written by A-2 to be sent to the higher officials complaining against one Amalraj. A comparison of Ex.P82A manuscript of the letter and the statement of A-2 under Ex.P149 would reveal that both have been written by the same person. Admittedly, Ex.P149 statement was written and signed by A-2. Ex.P82A manuscript cannot be prepared or manufactured by the officials of the NCB Wing. The mere denial of handing over of those documents by P.W.13 cannot in any way take away the tenor of the documents. At this juncture, it is pertinent to point out that in her statement given under Sec.313 of Cr.P.C., she has stated that the case was foisted at the instance of J.M.K.Sekar and Amalraj. The contention of the defence that P.W.13 has acted in collusion with P.W.12 in falsely implicating A-2 has to be rejected in view of the fact that P.W.12 informer has also turned hostile. Thus, from the above documentary evidence, it would be very clear that A-1 was in illegal possession of the contraband in question, and A-2 had taken steps for transporting the contraband safely from the possession of A-1, which, under the circumstances, would lead to the inference that it should have followed the conspiracy hatched up by A-1 and A-2 in that regard.

24. A controversy as to a question of law whether the statements recorded under Sec.67 of the N.D.P.S. Act has got value as substantive piece of evidence arose in the instant case. It was vehemently contended by the learned Special Public Prosecutor Mr.P.N.Prakash that though the witnesses namely P.Ws.6, 7, 8, 12, 13, 15 and 33 have turned hostile, the Court has to invoke Sec.53A(1)(b) of the N.D.P.S. Act to treat the statements given by them as a substantive piece of evidence in the light of the fact that they have not given any satisfactory explanation for turning hostile to the case of the prosecution. Contrary to the above, it was argued by the learned Senior Counsel Mr.B. Kumar on behalf of the appellants that the evidence of the witnesses recorded before the Court was only the substantive evidence, and the statement recorded under Sec.67 of the N.D.P.S. Act subsequent to retraction of the deponent was of no value, and it cannot be used either for corroboration or contradiction. The Court is of the opinion that the contention of the prosecution cannot be countenanced for more reasons than one. The statements recorded by the officials of the prosecuting agency under

Sec.67 of the NDPS Act were signed by the makers themselves, while the statements recorded under Sec.161(3) of Cr.P.C. is not signed by the maker, as they are recorded by the police officials at the time of investigation. The officials of the N.C.B. Department are recording the statements under Sec.67 of the NDPS Act in the absence of the accused concerned. There was no opportunity for the accused, which was a fundamental right available to the accused in criminal jurisprudence. The trial Court has given treatment to the statements recorded by the officials as substantive piece of evidence, though the witnesses have turned hostile. For doing so, it has adduced two reasons. Firstly, the officials of the NCB Department were entitled to record the statements from the witnesses under Sec.67 of the Act, and the officers being not police officers, there is no bar in admitting the statement. Secondly, the statement of objects and reasons for introducing the amendment in 1989 introducing Sec.53A in the Act. This Court is of the considered view that the reasons adduced by the trial Court are neither sound nor acceptable. It has been laid down by the Apex Court in a case reported in AIR 1952 SC 369 (ASWINI KUMAR GHOSE AND ANOTHER V. ARABINDA BOSE AND ANOTHER) as follows:

"The Statement of Objects and Reasons, seeks only to explain what reasons induced the mover to introduce the bill in the House and what objects he sought to achieve. But those objects and reasons may or may not correspond to the objective which the majority of members had in view when they passed it into law. The Bill may have undergone radical changes during its passage through the House or Houses, and there is no guarantee that the reasons which led to its introduction and the objects thereby sought to be achieved have remained the same throughout till the Bill emerges from the House as an Act of the Legislature, for they do not form part of the Bill and are not voted upon by the members. The Statement of Objects and Reasons appended to the Bill should be ruled out as an aid to the construction of a statute."

25. Sec.53 of the N.D.P.S. Act does not contain any non-absenti clause that the said provision shall prevail over the Evidence Act or any other law contrary to it. No doubt Evidence Act is a complete Code by itself. What is not evidence under the Evidence Act could never be utilised by any prosecution in a Court of law to arrive at any decision. Thus, the provisions of law under the Evidence Act in effect prohibit the employment of any kind of evidence not specifically authorised by that Act itself, and hence, the previous statement of a person could be used only for the purposes as mentioned under Sec.145 of the Evidence Act. No words have been employed by the Legislature under Sec.53A of the NDPS Act, which would alter the fundamental nature of evidence itself in a trial before a Criminal Court. In the absence of those words, the interpretation of the said provision would be against the legislative intent and inconceivable also. According to Sec.53 of the NDPS Act, previous statement could be admitted only if the witness is dead or cannot be found out or if alive and called as a witness, the Court in the circumstances of the case thinks just to admit. As to the question what could be the circumstances under which the Court could admit, it could be answered that the circumstances must be such to make the previous statement admissible. The term " circumstances" employed in Sec.53 of the N.D.P.S. Act has nothing to do with the validity of the statement or how it was given. If these statements are admitted as substantive piece of evidence, it would be violative of the provisions of the Evidence Act and would take away the fundamental right available to the accused to test the veracity of the

deposition by cross examination, and hence, the contention of the prosecution side that the statements recorded by the officials of the NCB Department have to be treated as substantive piece of evidence cannot get the approval of law.

26. The contention put forth by the appellants' side that the substance seized and produced before the trial Court is not a narcotic substance has got to be rejected in view of the evidence of P.W.11 Sankaran, who has categorically stated that he conducted the marquis test and found all the samples contained Di-Acetyle Morphine called heroin, and he has sent an interim report dated 11.6.98 marked as Ex.P70. He has also further added that he held betax test and confirmed that the said samples contained Di-Acetyl Morphine, and after conducting Gax Layer Chromotography, he found out the percentage of Di-Acetyl Morphine and gave a final report under Ex.P71. Thus, both the reports under Exs.P70 and P71 disclosed that the substance seized from A-1 was a narcotic substance namely heroin. Heroin comes under the opium derivative. Sec.2(xvi)(d) of the Act would show that the percentage of Di-Acetyl Morphine is not essential to ascertain whether a particular drug is a heroin or not. Therefore, the absence of percentage of Di-Acetyl Morphine as per Exs.P70 and P71 reports would not affect the case of the prosecution. From the above, it would be abundantly clear that the substance what was seized from A-1 by P.W.50 in the instant case was a narcotic substance namely heroin.

27. A specific charge under Sec.193 of the Indian Penal Code was framed against the second appellant/A-2 on the statement by the prosecution that she fabricated false evidence for the purpose of being used in the judicial proceedings if and when initiated against them; and that in order to use the evidence of P.W.6 Krishna Rao, P.W.7 Ayyannan, P.W.8 Vivekanandan, A.Mani, R.Karuppiah, P.Sekar and P.W.33 Prabhakar in favour of the accused, if the trial commenced before the Special Court on a complaint by the NCB, A-2 made these persons to give false statements under Sec.164 of Cr.P.C. before different Judicial Magistrates. This charge was rejected by the trial Court on the grounds both legal and factual. The learned Special Public Prosecutor in his attempt to sustain the said charge against A-2 would submit that only if the offence was committed during the pendency of a trial, Sec.19 5(1)(b)(ii) of Cr.P.C. will come into operation, for all other offences committed earlier to the commencement of the trial, Sec.195(1)(b)(ii) of Cr.P.C. would not act as a bar to file a complaint. Sec.195 of Cr.P.C. reads as follows:

"195. Prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence:-

(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 178 (both inclusive) of the Indian Penal Code, or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code, namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been

committed in, or in relation to, any proceeding in any Court, or
(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or
(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of any offence specified in sub-clause (i) or subclause (ii),
except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate...."

28. No doubt fabricating false evidence by abetting witnesses to record statements under Sec.164 of Cr.P.C. would fall under Sec.195(1)(b)(i) of Cr.P.C. It was contended by the learned Special Public Prosecutor that there are two limbs to Sec.193 of I.P.C. namely (a) Giving false evidence in a judicial proceeding; and (b) Fabricating false evidence with an intention to use it at any stage of the judicial proceeding. He would further add that if a person gives a false evidence in a judicial proceeding, then the Court before whom he has given such false evidence would file a complaint, and the proceedings under Sec.195 read with 340 of Cr.P.C. would be initiated; that under Sec.19 5(1)(b)(i) of the Code, a complaint from a Court is required for initiating a criminal action under Sec.193 of I.P.C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court; and that in the instant case, when Sec.164 Cr.P.C. statements were recorded from those witnesses, no proceedings were pending before the Special Court. According to the learned Special Public Prosecutor, in the instant case, the offence committed by A-2 falls under the second category namely fabrication of false evidence for the purpose of being used in the judicial proceedings, and in the instant case, all the statements of P.Ws.6, 7, 8, Mani, Karuppiah, Sekar and P.W.33 were recorded under Sec.164 of Cr.P.C. even before the initiation of the proceedings. Sec.195(1)(b)(i) of Cr.P.C. clearly stipulates "when such offence is alleged to have been committed in or in relation to any proceedings in any Court". It is pertinent to point out that the complaint in the instant case was filed before the Special Court only on 3.8.1998, though the case was registered on 9.5.1998 . Though their statements were recorded even prior to the filing of the complaint on 3.8.98, the case was registered on 9.5.98, A-1 was arrested, he was remanded then and there, the F.I.R. was placed before the concerned Court, and the proceedings were actually pending. Under Sec.195 of Cr.P.C., the Court shall not take cognizance of an offence if punishable under Sec.193 of I.P.C., when such offence is alleged to have been committed in or in relation to any proceedings in any Court, except on the complaint in writing of that Court or of some other Court to which that Court is subordinate. In the instant case, it cannot be stated that when the statements of those witnesses were recorded under Sec.164 of Cr.P.C., no proceeding was pending against the accused. Hence, as rightly pointed out by the lower Court, the charge against A-2 under Sec.193 of I.P.C. suffered on a technical ground of non-compliance of Sec.195(1)(b)(i) of Cr.P.C.

29. The trial Court has also pointed out that the prosecution has not bring home the guilt of the second accused under Sec.193 of I.P.C. even factually also. The prosecution relied on the evidence of P.Ws.13, 15 and 33. It is pertinent to point out that all these three witnesses have turned hostile. The lower Court has, on reasons, rejected the statements of P.Ws.15

and 33. The defence has examined one Thillairajan as D.W.1, who has categorically deposed that he was aged 50 years; and that he did not know P.W.13 at all. From the evidence of D.W.1 it could be seen that it was he who came to the NCB Office, posed himself as Thillairajan and gave the statement marked as Ex.P228. The lower Court has pointed out that the statement of P.W.13 cannot be given any evidentiary value. It remains to be stated that this Court has found that the statements recorded by the NCB Officials under Sec.67 of the N.D.P.S. Act cannot be treated as a substantive piece of evidence. If so, no proof was available to bring home the guilt of A-2 under Sec.193 of I.P.C.

30. So far as the charge under Sec.27A of the N.D.P.S. Act against A-2 for having financed for transportation of the said contraband from Madurai to her native place is concerned, it is the specific case of the prosecution that A-2 made a payment of Rs.300/- to P.W.13 Sam Immanuel and requested him to go to Madurai and bring the luggages of A-1 along with 2 kilograms of heroin. P.W.13, though gave a statement under Sec.67 of the N.D.P.S. Act as found under Ex.P79, has turned hostile. As rightly pointed out by the lower Court, Ex.P79 would indicate that P.W.13 received the amount of Rs.300/- only for the purpose of going to Madurai and not for the purpose of bringing the contraband from Madurai to Nagercoil. Therefore, in the absence of any satisfactory and acceptable evidence, the contention of the State that A-2 financed for transportation of the said contraband cannot be accepted.

31. In the light of the above reasons, it has to be necessarily held that the Court below was perfectly correct in finding the appellants/A-1 and A-2 guilty under Sec.29 of the N.D.P.S. Act for having entered into a criminal conspiracy, A-1 guilty under Sec.8(c) read with 21 of the N.D.P.S. Act for having possession of heroin and A-2 guilty under Sec.28 of the N.D.P.S. Act for having attempted to transport the contraband from Madurai to her native place. In view of the evidence both oral and documentary, the lower Court was right in acquitting A-2 for the charges under Sec.27A of the N.D.P.S. Act and Sec.193 of I.P.C. Therefore, this Court does not find any illegality or infirmity in the conviction passed by the lower Court.

32. Coming to the question of punishment, the lower Court has sentenced A-1 to undergo Rigorous Imprisonment for 15 years and to pay a fine of Rs.2.00 lakhs, in default to undergo Simple Imprisonment for 2 years for the offence under Ss 8(c) read with 21 and to undergo Rigorous Imprisonment for 15 years and to pay a fine of Rs.2.00 lakhs, in default to undergo Simple Imprisonment for 2 years for the offence under Sec.29 of the N.D.P.S. Act, while it has sentenced A-2 to undergo Rigorous Imprisonment for 15 years and to pay a fine of Rs.2.00 lakhs, in default to undergo Simple Imprisonment for 2 years for the offence under Sec.28 of the N.D.P.S. Act and to undergo Rigorous Imprisonment for 15 years and to pay a fine of Rs.2.00 lakhs, in default to undergo Simple Imprisonment for 2 years for the offence under Sec.29 of the N.D.P.S. Act. Needless to say, the crime committed by the appellants/A-1 and A-2 is against the society. When the said offences are committed by the two Officials in the rank of Superintendents, that too entrusted with the duty to enforce law strictly and book the offenders under the provisions of the said enactment, it is a matter of shock to note that they themselves have indulged in such kind of anti-social activities. Making it as a step towards the eradication of the evils to society by drug trafficking and considering the gravity of the offence, the Legislature has

imposed severe rigorous punishment on the offenders. Under such circumstances, when it is noticed by the Court that such offences are committed by the Officials, who are bound to protect the interest of the society by enforcing the said law, the Court can, at no stretch of imagination, either show sympathy or take a lenient view in the matter. Hence, the lower Court was perfectly correct in awarding the sentence. The Court is unable to see any reason to interfere in the quantum of sentence awarded. The Court is of the firm view that there are no merits in both the appeals, and the judgment of the lower Court has got to be necessarily sustained.

33. Therefore, both the criminal appeals fail, and they are dismissed, confirming the judgment of the lower Court.

Index: Yes
Internet: Yes

To:
1) The Special District and Sessions Judge for E.C.Act and NDPS Act Cases, Madurai.
2) The Principal District and Sessions Judge, Madurai.
3) The Superintendent, Special Prison for Women, Vellore.
4) The Superintendent, Central Prison, Vellore.
5) The Special Public Prosecutor for Narcotic Control Bureau Chennai.
6) The Superintendent, Narcotic Control Bureau, South Zonal Unit, Chennai.
7) The D.I.G. of Police, Chennai 4.

nsv/